DATE DUE

4/3/95			

THE

PRINCIPLES OF PUNISHMENT,

AS APPLIED

IN THE

Administration of the Criminal Law,

BY

JUDGES AND MAGISTRATES.

By EDWARD W. COX,

SERJEANT-AT-LAW, RECORDER OF PORTSMOUTH.

LONDON:
LAW TIMES OFFICE, 10, WELLINGTON STREET,
STRAND, W.C.

1877.

LONDON:
PRINTED BY HORACE COX 10, WELLINGTON-STREET, STRAND, W.C.

To

THE RIGHT HON.

RICHARD ASSHETON CROSS, M.P.,

PRINCIPAL SECRETARY OF STATE FOR THE HOME DEPARTMENT,

IN THE HOPE THAT HE WILL SIGNALIZE HIS TERM OF OFFICE BY DIRECTING HIS UNRIVALLED ABILITY AND ENERGY TO THE REMOVAL OF THE DEFECTS IN THE CRIMINAL LAW AND ITS ADMINISTRATION,

THIS LITTLE BOOK

IS RESPECTFULLY INSCRIBED

BY THE AUTHOR.

CONTENTS.

CHAPTER XIV.

CHAPTER XV.

CHAPTER XVI.

CHAPTER XVII.

CHAPTER XVIII.

CHAPTER XIX.

CHAPTER XX.

CHAPTER XXI.

CHAPTER XXII.

CHAPTER XXIII.

PREFACE.

It is necessary to explain the grounds upon which I have ventured to submit suggestions for the recognition of some principles by which punishments should be determined by Judges and Magistrates on whom the duty is imposed of administering the Criminal Law. Perhaps this may best be done by stating briefly how the question first presented itself, and what are the special experiences that alone could justify an attempt to supply what I hope may be accepted by those engaged in the like duties as not altogether worthless work.

Accident has given to me exceptionally extensive sources of information. Considerable practice for many years at the Bar of the Assizes and Quarter Sessions; having been Chairman of a Bench of Magistrates for fourteen years; presiding as Deputy Assistant Judge at Middlesex Sessions for a considerable

time during the long illness of the late Assistant-Judge and as Chairman of the Second Court for many years; for nine years Recorder of Falmouth, and since as Recorder of Portsmouth and sometimes sitting as Commissioner to assist the Judges at the Assizes, it has been my fate to try upwards of 13,000 prisoners for almost every crime except murder. The experience gathered in the discharge of these official duties could scarcely fail to teach some useful lessons and may, perhaps, excuse—what otherwise would be an impertinence—a design to submit to those who may have had less of such experience some hints gleaned from observation and reflection during that long and large acquaintance with the ways of crime and criminals and the practical administration of the criminal law.

The subject of this book was suggested thus. In the course of my practice, I had noted the extraordinary diversity of sentences passed upon criminals, not only by different Courts but by Judges of the same Court, for offences apparently alike. But I was aware also how difficult it is for any person, not being in the position of the Judge who tries the case, to form a fair opinion of the propriety of the sentence. So many circumstances, not admissible at the trial, are to be taken

into account for the purpose of punishment —so many inquiries into the antecedents of the convict and the general history of the case are to be made—that divers considerations often present themselves to affect the sentence, of which the public can know nothing. Therefore I was at first inclined to attribute the diversity of sentences to this cause. But recalling the various instances within my memory of the most astounding differences in punishments for crimes substantially the same and finding that other Practitioners had made the like observation, I was curious to ascertain the cause. Looking more closely at the practice of the criminal courts generally, the fact was patent. A marked difference was found between the sentences at the Assizes and the sentences at Quarter Sessions for the same offences. That was not an exceptional instance. The same differences were apparent between two Courts of equal jurisdiction, whether at the Assizes or at Quarter Sessions, although sitting in the same place and perhaps separated only by a wall, the Judge in one Court passing one sentence, the Judge in the other Court passing quite another sentence, for offences identical in name and almost alike in character. The difference between the judicial

authorities was sometimes such that it depended upon the accident of the trial being on one side or the other side of the wall whether the criminal would be sent to penal servitude or escape with six months imprisonment. A like diversity is seen daily in Magistrates' Courts in the exercise of the large summary jurisdiction given to them and which, for the most part, is *quasi*-criminal. Some years ago Lord BROUGHAM procured a return of the sentences at the Assizes and Quarter Sessions, and upon analysing this document it appeared that, although the lesser crimes only were tried by the Quarter Sessions, the average terms of penal servitude and of imprisonment respectively there inflicted considerably exceeded those at the Assizes trying the greater crimes. It is, however, but just to add that, since this return was made, there has been a very marked improvement in this respect at the Quarter Sessions throughout the country and a very different result would now be shewn.

On the 1st of April, 1870, Lord PENZANCE commented thus upon the inequality of the punishments awarded by the different Courts.

No doubt there is often an impression among the public that sentences are in some cases far too heavy, and in others far too light; but they are often imperfectly informed, for

the newspaper reports, although extremely able and faithful, are mere skeletons of the evidence, and readers of the public prints may very well come to the conclusion that there has been undue severity, whereas if they heard the whole of the evidence they would be perfectly satisfied. Still, no doubt, there is some amount of dissatisfaction with sentences and particularly with their inequality. That will always be the case so long as Judges have an almost unlimited discretion; and I would not desire to limit it, for it is obvious there may be circumstances of aggravation or extenuation which may call for a light or heavy sentence. In every criminal case, however, two things have to be considered—first, the heinousness or enormity of the crime itself, and, secondly, the particular circumstances under which the prisoner has committed it. Now the first, one would think, should be determined by the law. Take the case of forgery, burglary, or rape. One would hold forgery to be the worst crime that could be committed in a highly civilised and commercial community; another would hold that burglary was a much greater crime; and the third might hold that rape was the worst offence of all. Now, if you were to assemble fifteen men and take their opinions on these separate classes of crime, you would not find them agree; yet this is the question which the fifteen Judges have to determine. In passing every sentence, a Judge has to settle what is the enormity of burglary, forgery, and rape before he investigates how the standard of punishment should be exceeded or diminished in that particular case. If a Judge regards forgery as a crime of the deepest dye, he will invariably visit it with a very heavy sentence; but a Judge on the neighbouring circuit may see in it only a form of robbery or cheating, and every case of the kind will be leniently dealt with. This inequality of sentences is due to the absence of any standard; for if there were a standard laid down, still leaving the Judges the utmost liberty of increasing or diminishing it, it would be felt that in nine cases out of ten the Judges would not disturb it, for the circumstances of cases really differ very little. I venture to say that such a standard would be gladly adopted by the Judges in the large majority of cases, and we should thus obtain

something like uniformity of sentences, whereas, under the present system, we may be said to secure want of uniformity, every Judge being left to form his own opinion on the heinousness of the crime. When I first had the honour of a seat on the common law bench I was struck with the desirability of such a standard, which might be obtained either by Act of Parliament, by an Order in Council, or even by agreement among the Judges themselves. There would be no reason why it should not be altered from time to time, as the prevalence of a particular crime or other circumstances might render advisable.

And the then Lord Chancellor (HATHERLEY) added:

My noble and learned friend referred, and there I am more disposed to concur with him, to the different temperaments of those who are called upon to pronounce sentence on criminals. There are seventeen Judges, the chairmen of quarter sessions, recorders, and others. It would be preposterous, however, to award a strict sentence in every case without the least regard to the particular circumstances, and if this tribunal is to revise sentences, of how many persons is it to consist and how are you to secure unanimity? How are you to gauge the feelings of those who are called upon to act? The legal portion of the tribunal might possibly lean in one direction and the lay element in another, and it would be difficult to secure a unanimous opinion.

Whence then these acknowledged diversities? Is it not that Judges and Magistrates are moved more by impulse than by rule? Each has his own views of the spirit in which the law should be enforced. Some hold leniency, others severity, to be the best policy. Accordingly, an offence which one punishes with six months of imprisonment the other punishes

with two; where one imposes a penalty of 5*s*. the other imposes a penalty of 10*s*. Reviewing my own experiences, I found the same uncertainties. The question presented itself, whence they proceeded? The answer was obvious. Practically sentences are regulated by no rule. They are, in fact, the momentary promptings of the mind. Habit, not reason, has associated with certain offences certain punishments and so far they are not altogether arbitrary. But even to this extent they are the practice of the individual Judge or Magistrate. They are not based upon any *principles* capable of being generally recognised and acted upon. Hence their curious diversity.

Then comes the question: Is this as it should be? Is not such diversity in punishment to be deprecated? May not some *principles* be found by which the Judge and Magistrate may be directed (to some extent, at least), in the measure of punishment, so that there may be a substantial approach to uniformity and offenders no longer permitted to speculate upon the accident of where or by whom they will be tried as to what will be their punishment? Is not that punishment capable of being measured according to *some* rules? Or is the problem too complex for solution?

Are there, in truth, any *principles* by which punishment can be regulated? Is it not in its very nature arbitrary? Granting that such principles may be discovered, would not insuperable difficulties attend their application, by reason of the variety of circumstances that give to each crime special features that must be considered in determining the punishment—those modifying circumstances which no sagacity can anticipate and to which no fixed rule can be applied?

The complaint is general. The defect is acknowledged. It is a subject for regret by all who have given thought to the administration of Criminal Law. If the evil cannot be removed altogether, may it not be much restricted?

To these questions the opinions of others and especially of those most experienced in judicial duties and difficulties were invited. I submitted to them both the desire and the doubts. I found among them much difference of opinion. Some questioned the existence of *any* principles for the measure of punishment. Others thought there would be great difficulty in defining them and still more difficulty in carrying them into practice. All were of one mind—that the work would be of value in the administration of

justice if only it were *practicable*. I was, however, encouraged to make the attempt and the task was commenced in the hope that something might be effected, if only but a first step towards realising the design.

Entering upon it with some misgivings, I found it to be even more difficult than I had anticipated. I had no guide. I was compelled to grope my way without assistance, for the elaborate treatise of BENTHAM was quite inapplicable to the special purpose I had contemplated. His great work was designed to assist the law-*maker*. I sought assistance for those who *administer* the law. He treats of the law as it ought to be and not of the manner in which the existing law should be carried into execution. His magnificent treatise is the essay of a philosopher maturing in his own brain a grand scheme for a world of his own imagining. The task here proposed was induced by the far more modest desire to devise the best methods of applying the law as it is to men as they are.

It is necessary to premise that I contemplated nothing more than to submit *suggestions*. I designed only an endeavour to trace certain principles, or, to be more accurate, certain considerations, that might possibly assist the Judge and Magistrate in approxi-

mating to a just determination in punishments, so that good reasons might be given for awarding the various penalties to the various offenders. Obviously it would be impossible to frame rules applicable in all the countless varieties of circumstances that must be considered in sentences. Nothing more was practicable than the proposition of some general principles, to be modified according to the special circumstances of the particular case.

These suggestions, then, must be received as nothing more than *hints for the guidance of the mind in resolving what should be the punishment according to the character and circumstances of the offence.* More than this would be impossible at present, if, indeed, it be ever practicable. An attempt was made by "The *Habitual Criminals Act*," as it was first framed and introduced to Parliament and sanctioned by the House of Lords, to limit by law the discretion of Judges in the matter of punishment. It provided that two former convictions should in all cases entail a sentence of penal servitude for seven years. Judges, it was contended by its authors, are governed too much by their own feelings, or by fear of unpopularity, and they are more lenient than they should be, or would be, if their judgments

were directed by considerations for the suppression of crime rather than by compassion for the suffering of the individual criminal. It would be a relief to them to remove this discretion and with it the responsibility it entails. But, on the other hand, it was argued that, even if the law were to lay down a hard and fast scale of punishments, it would fail in practice, if opposed to the opinions of the Judge or the prevailing sentiment of the public. Rather than convict, with consequences to which they are averse, Juries would acquit altogether, or Judges would invite a conviction for some lesser offence and so, instead of increased stringency, punishment would be practically lessened. Such has been the experience of the unfortunate law that made seven years of penal servitude the minimum sentence after a former conviction. The consequence of this law has been that, instead of a term of penal servitude appropriate to the offence, Judges are frequently compelled to pronounce an inadequate sentence. These more rational views prevailed in the Commons and the discretion of the Judges was restored.

But that discretion should not be unlimited. It should be exercised according to some rule and with some approach to unity of action in all Criminal Courts. It

ought not to be that, for the same offence, a sentence of penal servitude should be pronounced in one court and of imprisonment for six months in another court. There should be at least an *approach to uniformity*. This can only be secured by recognising certain *general principles*, by which the mind may be directed in the formation of its judgment. It is in hope to effect somewhat towards the removal of the existing anarchy and to bring about more of *system* in the apportionment of punishment, without too much fettering the discretion of the Judge, that I have endeavoured, in the following pages, to construct a rude scheme of the considerations that should present themselves to the judicial mind and to suggest a scale of punishments. The subject is new and this outline of it is merely tentative. Doubtless, if it should prove useful in practice, it will admit of much extension and modification and that which is now merely suggestive may hereafter mould itself into definite principles and take the shape of a formal treatise. At present, I pretend to nothing more than to offer to Judges and Magistrates certain *hints*, that may or may not assist them in the administration of criminal justice.

And here, perhaps, I may be allowed to throw out another suggestion, with the same

object. It is that they who administer the criminal law should hold occasional, or, as I should prefer, periodical conferences upon the subject of punishments. There is a fashion in crime as in other things and prevalent offences require to be suppressed by exceptional severity. How effective that is was decisively proved in the instance of the crime of garotting, which has almost disappeared under fear of the lash. If the Judges of the Superior Courts and the Chairmen of Quarter Sessions were to meet once a year and review the question of crime and punishment and come to some general resolutions as to the treatment of the offences then most prevailing, their combined experiences could not fail to bring about an approach to uniformity and prevent the scandals of which Lord PENZANCE, with too much truth, complained.

A like conference of the Stipendiary Magistrates would be no less advantageous in producing unanimity of rule in the infliction of penalties in the large summary jurisdiction exercised by them. Their resolves would doubtless regulate, to a considerable extent, the decisions of the unpaid Magistracy.

A brief outline of the scheme, as it appeared when first it was reduced to definite shape, was published some years ago as an introduc-

tion to an edition of the Criminal Law Consolidation Acts. Imperfect as it was, I have found it useful in the performance of my own duties and others have informed me that it has been useful to them. At their suggestion I have rewritten and much enlarged the work, filling up that outline with the results of so many more years of extended experience. It is now submitted in a more formal shape to those whom its subject may interest, with the hope that, imperfect as I am conscious it still remains, it may yet be of some practical assistance to others in the performance of their judicial duties or at least form the foundation of a work which abler hands than mine may hereafter complete.

1, Essex Court, Temple,
1*st January*, 1877.

THE

PRINCIPLES OF PUNISHMENT

AS APPLIED IN THE

Administration of the Criminal Law.

CHAPTER I.

THE PURPOSE OF PUNISHMENT.

Private punishment.

PUNISHMENT by parents or masters has for its primary purpose the prevention of the offender from repeating his offence.

Public punishment.

Punishment by public law has for its primary purpose the deterring of persons who are not offenders from becoming offenders. The main design of the one is to *reform* the individual wrong-doer, of the other to warn possible wrong-doers.

Purposes of punishment.

The principles that should govern the measure of punishment cannot be understood without a clear comprehension of the objects for the attainment of which the punishment is designed. Upon this question there is much difference of opinion. These diverse views as to the administration of criminal justice, the treatment of prisoners and the management of prisons,

have their source in an unacknowledged—perhaps an unconscious—difference of opinion with respect to the ends for which public punishment should be designed. In all the discussions of the Prison Congress at the meeting in London in 1874, this was plainly to be seen shaping the arguments on either side—the true cause of disagreement. If the Congress had commenced its useful labours by determining what should be deemed the proper purpose of punishment, three-fourths of its work would have been saved and its results would have been much more fruitful of good.

Reformation of the criminal.

Manifestly the prevailing notion was that the primary, if not the sole, object of punishment is the reform of the criminal. Hence the often repeated cry that "the criminal is Society's failure"—that he is to be pitied and petted, preached to, talked to and taught, and that he should be kept under lock and key only because he may not otherwise sufficiently appreciate the kindnesses lavished upon him.

Example.

I ventured to interpose a hint that this was to mistake entirely the purpose of punishment, which is mainly designed to deter from the commission of crime by dread of the consequences; that, so far as the law is concerned, its object is—example; that reform is a secondary consideration, not properly within the scope of the administration of criminal justice, being based upon other principles and to be promoted by other agencies.

The Sentimentalists sighed with holy horror when this barbarous doctrine, as it was termed, was indorsed by some other speakers.

Design of this work.

The following attempt to trace the principles upon which punishment should be inflicted by criminal courts is based entirely upon a distinct and definite assertion of the objects, to accomplish which punish-

ments were devised. Therefore it is necessary, alike for understanding of the arguments used and for justification of the practice recommended, that the true purposes of public punishment should be distinctly defined at the beginning of the work. If the definitions submitted to the reader are not accepted by him, I must ask him at once to throw aside the book; for the entire of it is based upon the assumption that punishments should be directed exclusively to attainment of the ends so asserted.

It must be understood that we are treating here of the punishments inflicted by *the law* for public purposes. Punishments by private persons, being designed for different ends, may be properly governed by different principles.

Punishment means *pain*.

Punishment means *pain*—bodily or mental pain—and there is no punishment that does not involve the conception of pain inflicted in some form upon the subject. Even pecuniary penalties are painful, inasmuch as they are assumed to take from the subject of them some pleasures he would otherwise have purchased. They proceed upon the principle that thegratification obtained by the offence may be too dearly purchased at the price to be paid for it. It is in the adaptation of this principle to the special circumstances of each case that the discretion of Magistrates is so much exercised. In the infliction of pecuniary penalties this golden rule should be ever before them.

Punishment by the law contemplates *three* definite objects.

Three objects of legal punishment

1. Its primary purpose is to deter from the commission of crime by fear of the pain that follows upon detection. Knowing what the law is and seeing what is suffered by offenders against it—precept being thus enforced by example—the threat of punishment

operates as the strongest restraint upon the evil-disposed.

2. The second purpose of punishment is to deter the offender, by recollection of the pain he has already endured, from repeating his offence.

Moral reform.

3. The third and last purpose is the reform of the moral nature of the criminal, so that he may be restrained from future crime, not by fear of the punishment, but through virtuous inclinations instilled by the prison teachers—in fact, a process of moral regeneration.

Punishment can be directed certainly to the promotion of the first and second of these purposes. They are obviously within the range of legislation and must in all cases be considered by those who administer penal law.

But the *third* object is difficult and doubtful. It is a question if it be rightly a part of penal law; if it does not more properly fall within the province of private benevolence. The best authorities are at issue alike upon the means by which reformation should be attempted and upon the practicability of its accomplishment. For my own part, I doubt if the habitual criminal is ever reformed. It is to him that the greatest endeavours are directed, and with the most probability of success because of the longer time permitted for the application of a remedy which must necessarily be slow. At all events, in this book, which professes to deal only with preventive and deterrent punishment, the question of reformation will rarely arise. It must be remembered that reformation means such a change in the moral nature of the criminal that he shall no longer have an *inclination* to repeat offences. It would be good for Society if such a change could be readily wrought. To the moral philosopher its accomplishment will appear very

doubtful. Practical laws, practical judges, and practical magistrates must proceed on the assumption that fear of the penal consequences of crime is a much better protection for society than the chance of a reform, of the reality of which there can be no other proof than professions. The expressive proverb, "When the devil was sick," &c., is too often found to be true to justify reliance upon such a remedy.

Sentimental views.

The contention of the Sentimentalists is based upon the assumption that reform is the main purpose of punishment, and in their zeal for this fallacy they quite overlook the true object, which is, not vengeance upon the criminal, but the prevention of others, by the example of his pain, from becoming criminal. They parade, with much commendable pride, statistics showing how many criminals have returned to an honest life—or to speak more correctly, who have not been convicted a second time. But they leave out of the account altogether, and indeed no materials exist for accurately ascertaining, how many have been deterred from yielding to criminal inclinations by fear of consequences. The province of public penal law is simply the protection of society against those who would invade person, property, or peace. It has properly no concern with the private characters or doings of its members.

Proper province of criminal jurisprudence.

Acts of Parliament are not passed to make men virtuous, but to restrain them from injuring their neighbours. Liberty is the right to do whatever the individual desires, provided that, in the exercise of his own liberty, he does not invade the like liberty of others. To teach men what they ought to do or ought not to do in relation to themselves is the business of the Divine and the Schoolmaster. Legislators are trespassing beyond the proper province of

jurisprudence when they attempt to legislate for *vices*. Their jurisdiction is only over *crimes*, which are offences, not against individual morals and the current notions of morality, but against the persons, the property, and the peace of other people.

Imperfect classification of offences.

A vast amount of misapprehension and controversy upon the principles of punishment and their application would be avoided if the Criminal Law were adapted, not merely to something approaching to scientific arrangement, but to common sense, and the present irrational and absurd classification of offences abolished. It is not difficult to conceive of an abstract distinction between Felonies and Misdemeanours. But the distinctions established by our Criminal Law are utterly without reason. It would perplex the ablest of our Jurists or Criminal Lawyers to discover even an approach to a principle by which an offence, from its own nature, has been placed in one category or in the other. The origin of the existing distinction is clear enough. Felony formerly involved branding and forfeiture of property. Offences were then made felonies or misdemeanours according to the views entertained by the Legislature of the degree of severity required for their prevention. Hence a multitude of offences are now classed as misdemeanours which are in fact crimes, equal to and often greater in degree than offences classed as felonies. Measured by any standard of right and wrong, fraud is not a lesser but a greater crime than petty larceny, for it implies forethought and deliberation and a certain amount of intelligence and moreover is more difficult to be guarded against by the victim. But our imperfect criminal law still terms fraud a misdemeanour only. Many like cases will present themselves to the experienced reader. The

reform in the Criminal Law and its administration which cannot be much longer deferred must have for its foundation a new classification of offences against person and property, abolishing the present irrational distinction and with it one at least of the names to retain which would but protract mental confusion after the law itself had recognised the rational because the true distinctions.

Rational division of offences.

And what are these? Obviously, there are two classes of public offences. 1. *Crimes*, which are *mala in se*. 2. *Misdemeanours*, which are *mala prohibita* and involve the notion of *misconduct* only and not of *guilt*.

But the law has abolished the only substantial differences between felonies and misdemeanours by the *Forfeiture for Felonies Act* (33 & 34 Vict. c. 23), and therefore the one ground for maintaining a senseless, and in practice very mischievous, distinction has been removed. May common sense venture to hope that we shall soon see a practical application of the familiar maxim *cessante ratione*, &c. It would be an enterprise worthy of the practical genius of Mr. Cross.

The subject, however, has not been introduced here with any reforming purpose, but because the distinction which the law fails to recognise must be more or less entertained by Judges and Magistrates in the administration of the criminal law. It lies at the foundation of the principles that will be here suggested as those by which the meting out of punishments should be governed. For this purpose it will be found to be impossible to observe anything like the classification which the law has made. Although the calendar or the indictment may designate one offence as a felony and another as a misdemeanour, it will be

impossible for those who administer the law to recognise the legal distinction beyond the legal limitations of punishment. The Judge must forget what the crime is *called* and look at what *it is* in fact. In this he will often find himself compelled to treat many misdemeanours as greater crimes than felonies and some felonies as lesser crimes than many misdemeanours.

CHAPTER II.

CRIME AND CRIMINALS.

BEFORE we consider the principles that should govern the meting out by the Judge and Magistrate of the punishments which the law has affixed to offences, it will be useful to examine the prevailing causes of crime, as presented in a brief review of the principal *classes* into which *criminals* may be roughly divided.

Of these there are *three*, who may be designated thus:—

Classification of criminals.

1. The Professional Criminal;
2. The Occasional Criminal;
3. The Accidental Criminal.

The professional criminal.

The *Professional Criminal* needs no description in this place. His character and calling are familiar to every reader. He makes a business of crime. He pursues it as regularly and systematically as does the honest man his own trade. He has been educated to it. He has lost all consciousness of moral wrong in the pursuit of his profession. He knows and calculates his risks. He counts upon so many successful adventures before he is caught. He estimates his chances of escape when caught. He reckons upon so many months per annum of imprisonment to be set off against his successful enterprises. He deliberately purchases so much present pleasure at the price of so much of

future inconvenience. When at length convicted, he knows how to pass through his compulsory retirement in the prison with as light a heart as may be, and therefore of all its inmates he is the most obedient to the governor and warders and most contrite to the chaplain. We shall have occasion to refer to him hereafter when treating of the manner of dealing with his class.

The occasional criminal.

The *Occasional Criminal* is less readily recognised. This class is more numerous than it is commonly thought to be. It comprises the criminals who do not make crime a business, but who are continually committing petty crimes. For the most part they are persons with some natural moral obliquity, or what is commonly called weak-minded. Without assenting in the least to such a plea of *kleptomania* in excuse for theft as the law or a jury could accept as ground for an acquittal, it is impossible not to recognise the fact that there is a condition of mental debility, by no means uncommon, in which the patient loses the power of self-restraint and becomes the slave of every impulse. Certain forms of theft have a strange tendency to repeat themselves until they become habits, when the object cannot be seen without prompting a desire to procure it by the like process as before. With criminals of this class the inducement is often not so much the possession of the article as a certain sense of pleasure they feel in the exercise of cunning. The *furtiveness* is the attraction. This is the *rationale* of most of the cases of petty thefts in which the thing stolen is of such trifling value that the gain is out of all proportion to the hazard.

The accidental criminal.

The *Accidental Criminals* are at once the most numerous and the most difficult to deal with. The class comprises all those who have committed crime through

the impulse of some sudden temptation or the urgency of some pressure, in a reckless moment, under the influence of a passing passion, or more frequently to gratify some self indulgence. This is, indeed, the besetting sin that leads directly to crime. If the Judge were to record in his note book the result of an inquiry into the cause of the crime, after each conviction for dishonesty, he would find that in nine out of ten cases where the motive could be traced, it was committed to gratify some appetite or to indulge in some pleasure which the criminal could not otherwise procure without the labour of working for it. The source of this class of crime is the lack of self-denial or self-restraint. There is an active desire for present indulgence without due care for future consequences. But these offences are not always committed without some calculation of chances of escape from detection and punishment. No person not positively insane would commit a crime (save under the impulse of passion) if he felt an absolute assurance that he should certainly be caught and punished. If punishment could be made to follow surely and speedily upon the heels of crime, criminals would almost cease to be. As the chances of escape are multiplied so are the inducements multiplied to dishonest gratification of desires. In fact the intending criminal counts, with reason, on the many chances that favour his escape from the penalty. There is the chance that he will not be seen, or not be known, or that the loss will not be discovered. Then there are the chances (unfortunately for society too frequent) of the wronged not prosecuting, and the still greater chances that some defect in proof, or the fallacies of a clever counsel, or a stupid jury, may secure ultimate acquittal. Few of those who contemplate a crime are ignorant of the

Calculation of chances of escape.

fact, familiar to all acquainted with the machinery of criminal justice, that but a small fraction of the crimes committed are prosecuted to conviction. Experts have estimated the chances of escape as thus. In but one larceny in eight is the thief detected, of those detected only one in three is prosecuted, from reluctance to incur certain trouble and probable cost. Of those who are finally prosecuted nearly one half are acquitted. Thus the chances are largely against any particular crime bringing the criminal to punishment. The criminal, like other gamblers, relies upon his luck and hopes that this offence will not be a bad throw where so many chances are in his favour. The object of a good and efficient criminal law will, therefore, be to contract the chances of escape and thus to diminish the hope of impunity based upon the calculation of chances. But so long as these chances are provided, the punishment, when the criminal is caught at last, should bear some proportion to his past escapes.

Confidence in good luck.

If to these too probable chances of impunity we add the confidence every man has in his own good luck, it will cease to be a surprise that persons who have little love of virtue for its own sake to restrain them, but only dread of penal consequences, should yield to the desire for present gratification. The chances are largely with them. Assured by the success of a first attempt, they take courage from impunity and the means of indulgence are sought with less scruple. In the end, emboldened by escapes, they become reckless and are caught. And this is the history of the great majority of the criminals with whom Judges and Magistrates are required to deal.

There is another class of criminals, not numerous, who have become criminals from special circumstances.

We refer to offences committed under pressure of urgent need, positive poverty, or in the impulse of a great sudden temptation. Cases of this kind demand a different treatment, which will be described hereafter.

CHAPTER III.

THE PRINCIPLE OF PUNISHMENT.

Such being the ordinary causes of crime, and such the characteristics of *criminals*, it is not difficult to discover what is the principle that should govern the measure of punishment employed for the purpose of repressing crime.

Motive to crime.

Excepting only crimes of *passion*, the motive of all crime is to gratify self-indulgence, without the disagreeable condition of procuring the means for it by honest industry or paying the proper price for it.

The temptation to the dishonesty is the hope, almost amounting to confidence, that he will escape the consequences.

Measure of punishment.

The measure of punishment must, therefore, be such that the danger of incurring it shall, in the imagination of the would-be criminal, exceed the gratification he expects to derive from the coveted indulgence.

If the chances of escape could be so reduced that, instead of twenty to one in his favour, they should be twenty to one against him, a very slight measure of punishment would suffice to restrain the lawless hand. But as the chances of evading the penalty are multiplied, the necessity arises for increasing the severity of punishment to the point at which it will operate to deter by making the criminal ask himself, "Is this pleasure

worth the risk of so much pain?" This is the principle upon which the law is framed, wisely recognising that the object of punishment is the prevention of crime by example of its consequences. Its success in the accomplishment of this object cannot be measured by the numbers it fails to deter and who commit crimes in spite of it. Account must be taken of all those who, but for the fear of that punishment, would have been tempted to become criminals. There is no more mischievous fallacy than to test the effects of punishment by the numbers who subject themselves to it. The best proof of the efficacy of any penal law is that it finds few offenders. It has, in fact, deterred so many more from offending. But of this the Sentimentalists take no account. They object to certain kinds of punishment and ask why they should be retained seeing that the persons who subject themselves to them are so few. But the punishment is proved thus to have done its intended work. It *has* deterred by fear of it.

Our law does not punish for the sake of vengeance. It is not designed for retaliation. It is not based upon the principle of an eye for an eye, a tooth for a tooth, life for life. Vengeance upon the criminal does not enter into its contemplation. It contemplates nothing more than to deter others by example of the pain endured by the convicted criminal, and to prevent the offender from again offending by the recollection of his own suffering.

CHAPTER IV.

LEGAL CLASSIFICATION OF CRIMES.

Classification of *crimes.*

THE LAW can measure only the character of the crime, and this but rudely and imperfectly. It classifies offences, not in relation to their moral character, but according to a scale estimated by certain items of mischief to the community which each crime is assumed to inflict. Taken in the order of their importance, they may be thus described.

Offences against the person.

First, offences against *the Person.* These are properly accounted as of greater magnitude than offences against property: (1.) Because a bodily injury inflicts more suffering upon the Person wronged. (2.) Because it is attended with more or less of violence and terror. (3.) Because protection against it is more difficult to be devised. (4.) Because of the alarm and consequent sense of insecurity which it spreads through the community. Hence the severity of the punishments which all civilised peoples have affixed to offences of this class, which range from the highest crimes, treason and murder, to almost the lowest degree of crime—a trivial assault.

Offences against property.

Second, Offences against *Property.* The punishments of these offences are intended by the Legislature to be measured—

(1) Circumstances attending the crime.

(1.) By the circumstances attending the offence, as when it is committed in a highway, when a house is broken open by day, and more alarming still, by

night; poaching at night, armed with weapons, because of the danger to life; and such like.

(2.) By the difficulty of protecting the property against the plunderer, as horses and cattle in fields, poultry in yards, growing crops and such like, of necessity exposed and yet impossible to be guarded by the owners and which, therefore, the law properly endeavours to protect by severity of punishment against those who avail themselves of the facilities that unavoidably offer for the commission of the crime. (2) Difficulty of protection.

(3.) The ease with which the crime may be committed as compared with the gravity of the possible consequences. Hence the severity of the punishment imposed upon forgery and coining and uttering of a forgery or of base coin. No reasonable precautions will protect the community against the successful practice of these and the like forms of crime, and therefore the law endeavours to provide protection by acting upon the fears of intending wrong-doers, inducing them to look upon the profit of the crime as not worth staking against the penalty in case of detection. (3) Ease of commission.

Third, Offences against the *Peace*. The law measures offences of this class, not by the individual act but by the collective mischief done. A breach of the peace by one person may provoke the interference of many persons and a small disturbance grow into a serious riot. Therefore it is that the law affixes the punishment, not according to the act of the individual offender, but by subjecting each to a penalty proportioned to the sum of mischief done or of danger and alarm caused by the acts of the aggregate body. Hence its apparent severity. The justice and wisdom of thus dealing with this class of crime will be at once apparent. Offences against the peace.

CHAPTER V.

THE PROVINCE OF THE JUDGE.

Limited power of the law.

It is apparent from the brief review in the preceding chapter of the principles upon which the Law affixes certain punishments to the various *classes of crime*, that the *Law* can but very imperfectly measure the punishment to be inflicted in particular cases. Of the motives of the criminal, of his character, of the many circumstances attending the crime that should properly be estimated in mitigation or in aggravation of the offence, it can take no note. Hence the very large discretion with which it is necessary to invest the Judge or the Magistrate by whom the law is administered. This the law accomplishes by the simple expedient of declaring the nature and extent of the punishment to be inflicted on each offence, leaving to the judgment of the Court the largest latitude for *mitigation* of the legal penalty, according to the special circumstances of each case.

The nature of this discretion appears to be very imperfectly understood by the public, and it is not always clearly comprehended by the administrators of the law. A short explanation of it, therefore, may not be out of place.

Province of the Judge.

The province of the Judge is purely beneficent. The law affixes the punishment to the crime and gives

to the Judge power to mitigate that punishment, as in his judgment he may deem to be right, upon consideration of all the circumstances attending the particular case. The *law* looks at the *crime* and imposes the punishment which it deems appropriate. The consideration of the *Judge* is for the *criminal*. He has to determine to what extent — tempering justice with mercy and consulting the interests of the public as well as the character of the prisoner— he may properly *reduce the penalty*. He has no power to increase to the slightest extent the severity of the law; he may *mitigate* it to almost any extent.

Province of the judge is to mitigate.

This province of the Judge and Magistrate is so little understood by the public that complaints are sometimes made of the *severity* of a Judge. The writers of sensation articles in the newspapers, in search for a subject, take especial pleasure in this work. It is at once so easy to write about and so pleasant to read. Gushing correspondents, revelling in a cheap philanthropy, follow in the wake, both alike unconscious that the *severity* is of the *law*, and that what the much-abused Magistrate had done was in the direction of *mercy*. The degree of this *mitigation* is a question that can be determined only by such a knowledge of all the facts as the Judge alone can acquire after the conviction of the criminal, but which are quite unknown to the public, to the reporters, and to the commentators.

Judicial severity.

These self-constituted critics are, as it would seem, ignorant that English law, differing in this respect from the law of all the Continental States, in its extreme regard for the criminal and desire that he shall have a fair trial, does not permit evidence of *bad* character and of past misdeeds to be proved in the witness box and submitted to the jury. Not even a

Leniency of English Law.

former conviction can be proved against him until after the present charge has been decided. Consequently the Judge is compelled to form his judgment of the extent to which he may rightly exercise his power of mitigation upon information obtained *after* the trial is concluded and from any sources that may be satisfactory to his own mind. No onlooker can possibly know what is the material upon which the decision is formed and consequently none is competent to determine if the conclusion of the Judge was right or wrong.

Suggestion for passing sentences.

Seeing the injustice thus often done to Judges and Magistrates, it has occurred to me that the practice in passing sentence might be advantageously altered. As it is, the Judge accompanies the sentence with such exhortation as he may be pleased to add. Would it not be an improvement if, *in all cases*, the full penalty which the law attaches to the *crime* should be stated, and then that the Judge should declare the reasons for such mitigation as he may have determined upon? Many advantages would result from this practical reform. Offenders and potential offenders would learn the extent of risk incurred by such a crime, which at present is not known to them inasmuch as they do not consult the statutes and hear only the mitigated sentences. If this were done, the Judge would always appear in his true character as the *mitigator of the law.* The public would learn also the grounds of such mitigation. And last, not least, the Judge himself, being required to state his reasons, would be compelled to base his sentences upon substantial grounds of definite fact and thus avoid the caprice that sometimes attends the hasty decisions of the most righteous of us.

If, for instance, the convicted criminal were to be

addressed after this manner, "John Jones, you have been convicted of larceny, that is, of stealing. For that crime the law inflicts the punishment of two years' imprisonment. But the law has given to me the power to mitigate that punishment to such an extent as the circumstances of your crime may justify. Considering that this is your first offence, that you have hitherto borne a good reputation, and in the hope that you will endeavour hereafter to lead an honest life and regain the character you have lost, I mitigate the full penalty and sentence you to be imprisoned, &c., for four calendar months only."

CHAPTER VI.

CLASSIFICATION OF CRIMINALS.

Imperfect classification of offences.

As already stated, the classification of *offences* by the existing law is so irrational and unmeaning that not only does it afford no assistance to Judge, Advocate, or Student, but it serves to confuse in all minds what is really a very simple and intelligible matter. The criminal law, as it is now, is an anachronism. Felony was formerly a formidable word with a formidable meaning, and carried to the popular as well as the legal mind very definite conceptions of consequences. It was not merely that the imagination attached to the term "felony" a vague notion of serious crime; felony was in fact punished with special severity, inasmuch as it carried with it other disagreeable consequences than the mere sentence. To be "a felon" was an indelible stigma in the popular mind. But why one crime was called a felony and another a misdemeanour, and upon what principle the distinction is still maintained in new criminal legislation—who can say? The classification was and is purely arbitrary. It was not, however, merely a difference in name, for the term "felony" carried with it various degrees of penalty *plus* the sentence imposed upon the particular crime—such as forfeiture. These consequences are now abolished and therefore we can no longer look

for a distinction between crime and misdemeanour in the nature of the *punishment*, but we are driven back for a definition to the nature of the *crime*. In this the law is now hopelessly arbitrary. It is regulated by no principle; it recognises no rule. The crimes made misdemeanours are often morally worse and higher in degree of criminality than crimes called felonies, while many offences against the community are really more criminal than those the Legislature has chosen arbitrarily to term misdemeanours. Nor does the punishment help us to an explanation, for here also the penalty for a misdemeanour is often found to be greater than the penalty for a felony. If an attempt were made in any manner to apply the principles of punishment according to the classification of offences by the law, the Judge would find himself hopelessly bewildered. Quite another arrangement must, therefore, be adopted for the purpose to which these pages are devoted—the practical application of the principles of punishment in the administration of the criminal law.

Proposed alteration in classification.

When the law is restored to reason in this respect the word "felon" will be abolished, and it will be convenient if at the same time the Statute Book were cleared of the word "misdemeanour;" not because it is in itself an insufficient word, but because it is so associated in the public mind with the term "felony" that the survivor will be sure to recal his dead brother. It will be difficult to impress the public consciousness with the conviction that the word "felony" is really dead. A slight change will suffice permanently to divorce them. Let offences be divided into (1), *Crimes*; (2), *Misbehaviours*. Here is a tangible and sensible distinction in name, descriptive of the difference in fact. The words will to a con-

siderable extent define the things, as names of art should do, and in the administration of the law they will be clearly understood and readily remembered.

This, however, is merely a suggestion. The present purpose is to classify *criminals* rather than *crimes*, for thus only can the question of punishment be properly considered.

Degree of criminality for the judge.

The *law* can take cognizance of *offences* only, and according to its own measure of the more or less heinous character of each, so does it prescribe the punishment. It vests in the Judge and the Magistrate power to measure the *degree* of criminality in each case and the circumstances of aggravation or mitigation and to reduce the penalty imposed by the law to such extent as his judgment may approve. Hence the classification of crimes, as recognised by those who administer the law, necessarily differs from that of the Legislator who makes the law. They who administer the law must take into account many circumstances for which the law maker could not provide by anticipation. Applying these attendant circumstances to the crime, he will be enabled, with some accuracy, to determine to what extent they should modify the severity of the law, always bearing in mind that, in measuring punishment, the efficacy of *example* is to be considered, as well as how far, in the interest of justice, this may be compatible with mercy to the criminal.

This premised, for judicial purposes, offences will be found to range themselves into a few obvious divisions.

The character of the crime.

The first matter for deliberation, in considering the measure of punishment, is *the character of the crime*; the second is, *the character of the criminal.*

Crime varies widely in its character when viewed,

not as it is classified in the criminal code, but as it must be estimated for the purposes of punishment. The following list of offences is not exhaustive, but it contains all that most requires consideration, and in this order it is proposed to treat of them, suggesting to the reader as to each some general rules of guidance to *aid*, not to *control*, his judgment.

After the most anxious regard given to these, there will commonly be found much that will require the exercise of the further discretion of the Judge, growing out of the special circumstances of the particular case which cannot be anticipated nor provided for.

Classification of crimes for judicial purposes.

The following is the proposed classification *for judicial purposes* :—

I. Crimes of Wantonness;
II. Occasional Crimes;
III. Crimes involving Breach of Trust;
IV. Crimes of Fraud;
V. Crimes of Passion;
VI. Crimes of Violence;
VII. Crimes of Cruelty and Brutality;
VIII. Prevalent Crimes.

Each of these will be separately considered in the following pages, with purpose to trace the principal characteristics which should weigh with the Judge in treating the persons who are guilty of them.

This classification does not pretend to be exhaustive; but it may be found of some practical value in assisting the Judge and Magistrate to determine the *proportions* of punishments by supplying to him material that may help him in his desire to base his decisions on substantial reasons. A sentence ought not to be arbitrary. There should always be some assignable reason why so much more or so much less of punishment is awarded to this than to that offence, or to this than to that offender.

Sentence should not be arbitrary.

Experience has taught me the difficulty of doing this and how much easier it is to say it ought to be done than to do it. Because I have many times found myself failing in this respect, and not sufficiently measuring the elements of wrong in the crime and the criminal which should determine the degree of his punishment, it is that I have endeavoured here to put them into definite shape for present guidance and future reference. I print them in the hope that they may be useful to others as they have proved to myself.

CHAPTER VII.

I. CRIMES OF WANTONNESS.

The Magistrate, before whom offences of this nature for the most part come, has no more difficult duty than to determine how to deal with them. The offenders are for the most part young and sometimes weak-minded. They sin more often from thoughtlessness than wickedness. Nine in ten of them are boys, or very young men, and some are merely children. But their offences are not rarely of very formidable character, from the amount of injury inflicted or that may have been inflicted, and from the alarm and often actual danger to the community resulting from them. Such, for instance, is throwing stones at passing railway trains—placing obstructions upon the rails—breaking windows with pebbles carelessly flung about—letting off fireworks in a frequented highway—tearing down fences and walls—setting fire to furze or hedgerows—lighting matches under hayricks—and such like offences, that come within the frequent experience of every Bench of County Magistrates, a few of them being occasionally presented, in the form of an indictment, for the consideration of the Judge.

Offenders through wantonness.

For such cases the law provides no proper punishment and there is not a Magistrate with an experience of five years who has not many times found himself sorely perplexed how to deal with offenders of this class.

Juvenile offenders.

The existing law imposes upon these juvenile mischief-makers a money penalty or imprisonment. In some cases—as in obstructing railways—the punishment is imprisonment without a fine. The law is here grievously defective in two important particulars. It does not take into account the circumstances in relation to the criminal that go to affect the character of his offence, and it makes no provision for a proper distinction in punishments between the two widely divergent causes of offences of this class—namely, *wantonness* and *malice*—that is to say, between *folly* and *wickedness*—and so have given to the Judge and the Magistrate power to deal with the particular case accordingly as it presents one or the other of these very different characters.

The law has looked excusively to the public injury, danger, or annoyance by such offences—although it very inadequately punishes some of them.

True, it has given to those who administer the law a discretion—but it is not as to the *kind* of punishment, but only as to the *amount*. It strictly limits them to two forms of punishment, both of which are inappropriate to many of the offences—ill adapted to the majority of the offenders—worthless by way of example, and for which many Magistrates rightly feel, with myself, the strongest aversion.

Let us take some cases of frequent occurrence.

Imperfection of the law.

Half a dozen boys are summoned for breaking public lamps or smashing expensive windows by wanton stone-throwing. They are young—they are thoughtless—they are what we, their judges now, probably were at their ages. They are not wicked, only wild and inconsiderate. What is to be done with them? The *law* says they shall pay the damage and a penalty, or be imprisoned for a limited time if they cannot

pay. Of course *they* cannot pay a fine and costs, however trifling. It is a mockery of justice to call on a labouring lad earning 5s. per week to pay forty or fifty shillings. He *could* not pay so much as five shillings.

If he has parents, perhaps they pay the penalty for him. They pawn their clothes, or the other children are stinted in their food, and the whole family suffers the punishment while the offender goes free. In such case *he* is not punished, and probably not even deterred from repeating an offence from which he has escaped with so little inconvenience to himself, although with so much misery to others, while, as an *example*, this punishment is worse than worthless.

But if he has no friends, or they cannot or will not pay the penalty, what is the sole alternative permitted to the Magistrate?

Either to send him to gaol, or permit him to go altogether unpunished.

Objection to sending young persons to prison.

I know that many Magistrates and Judges, in common with myself, feel the very strongest aversion to sending young persons to prison—especially for offences that are not the product of positive and unmistakable wickedness. A prison is the worst school that could be devised for youth. True they are disciplined and instructed there and so far benefitted. But to my mind these benefits are outweighed a hundredfold by the mischiefs. In the first place, it seems to me a decisive objection to imprisonment of young persons that, once having seen the *in*side of a gaol they lose their awe and dread of the *out*side of it. Children and young lads and lasses, as every reader will admit who recalls his own early days, have almost a superstitious fear of a prison. They look at its high walls and its barred windows and clamped

doors with a most wholesome horror, and they imagine all kinds of terrible pains and penalties as inflicted within its gloomy cells. The mere threat of imprisonment usually suffices to keep them in good behaviour, and the dread of becoming an inmate of that mysterious building is no trifling element in the preservation of public order. True, it is a bogey—but it is a desirable bogey—and its utility is to be measured, not by the number who are consigned to it, but by the number whom dread of it deters from commission of the offences that would send them there.

But let the boy or girl once be brought within those walls and the charm is broken. The prison is then found not to be such a very frightful thing after all. It is not nearly so bad inside as it appears from the outside. There are no tortures and very little hardship. The wholesome awe of the prison is banished from that young mind for ever. It has ceased to be to him a source of fear and terror. Familiarity has even bred contempt. The prisoner does not afterwards refrain from indulgence because he dreads those bolts and bars.

Nor is this all the mischief. He has contracted the taint of the prison. He is thenceforth in the esteem of others a degraded person. He is the gaol bird and is so called, and being so called is shunned by his fellows. Employers are shy of him, or if *they* are regardless, his fellow workmen object to him. The prison is cast into his teeth whenever he has a quarrel. He is reminded of it continually. It is difficult for him to be honest if he would. Having lost the esteem of others he is degraded in his own, and not unfrequently lapses into a life of crime because he has once herded with criminals.

In the prison he is associated with actual criminals of the worst class. True, the regulations prevent verbal communication, but there are other signals than words. But if no direct evil flows from this, there are indirect mischiefs in the mere fact of being in the same building, in the same room, sharing the same fate, and therefore having to some extent a link of fellowship. He has heard before, and will often hear and read afterwards, of Bill Sykes, the brutal garotter, who was in the same prison with him. In his own mind he associates himself with Bill Sykes, and ever after there is a community of interest. He had traversed the same yard; sat on the same bench. Though he did not know at the time which of the masked faces was the great criminal hero, they had been sharing the same fate and he had been placed on the same level with him. Thenceforth the gaol and its inmates have an interest for that youth which becomes almost an attraction. A sympathy has been established which may readily glide into acquaintance, especially when the cold repulsion of better men reminds him that he has upon him the indelible mark of the "gaol bird." Herding with criminals.

For these and for many other reasons that would be tedious to set forth, but which will readily present themselves to the reflecting reader, I feel the utmost aversion to sentence a boy to *imprisonment*. To a young girl it is absolute ruin, and if any other provision can be found for her, I have steadily declined, and until otherwise directed by the Home Office I shall continue to decline, to inflict this form of punishment upon a girl. Whether sitting as Judge or as Magistrate, the objection is the same. But here we are met by the difficulty which the law has made for us. What is to be done with the young offender? A fine

is ridiculous. Imprisonment is social, and probably moral, ruin. To let the offence pass unpunished is unjust to those who suffer from the wanton misconduct of boys and would but encourage themselves and others to offend again.

What is to be done?

I repeat, therefore, the question that sorely perplexes every Judge and Magistrate: "What is to be done with juvenile offenders who commit offences from wantonness?" There can be no doubt what *ought* to be done. If the Judge or the Magistrate possessed absolute power and dispensed Cadi justice, he would not hesitate for a moment how to deal with such offences. No parent, no schoolmaster, would doubt what he should do and would do it. There is, indeed, but one punishment for boys committing these offences of wantonness —*whipping*.

Whipping juvenile offenders.

It is difficult to understand the sentimental objection to this punishment entertained by many persons possessing upon other subjects tolerably robust judgments. Perhaps it is the result of a reaction against the excessive use of the rod by our forefathers. For the most part the objectors have themselves a great fear of bodily pain and imaginations that picture its infliction so vividly that, in their sympathy with the suffering rascal, they forget the sufferings of his innocent victims. A garotter beats and bruises a man, making his after life a long pain—he disfigures and disables him. What more appropriate punishment for such a brute than bodily pain—the only penalty he regards? But the maudlin sentimentalist realises in his sickly fancy the triangle, and the lash, and the sufferer's shrieks, and forgets altogether the unhappy victim on whom his brutality has inflicted, not the torture of an hour, but the protracted suffering of months, years, perhaps of a life.

But whatever may be the weakness that protests against the flogging of brutal and cruel men, surely there can be no objection to the whipping of wicked boys—especially when the choice practically lies between that punishment and none. Can there be a question in any rational mind whether a birching is not preferable to a gaol for any lad under twenty? It is certainly more efficient, for it is more dreaded. It is adapted equally to reform the offender by making him fear to offend again and to deter others by his example. It is short, sharp, and harmless to body or mind—to health or to morals—to the present or the future of the young offender. In these respects it is surely better than confinement in a gaol, which cannot but be physically noxious to a growing youth, while the name and fame and associations of a prison are sure more or less to demoralise his mind.

Objections to whipping boys answered.

The objections made by the sentimentalists to the birching of bad boys are almost too frivolous for serious notice. Of course their substantial objection is to the infliction of *pain*. The answer to this is that *punishment means pain*. In some shape pain is designed by every penalty inflicted by the law. Even a money penalty is imposed with a view to make the person so punished feel the pain resulting from the loss of pleasure or advantage the money would have procured. Imprisonment is designed to be a pain protracted but not intense. Punishment would not be itself if it was not painful.

But this long continued pain is not capable of being realised to the imagination of the sentimentalist, and therefore is not measured by him. It takes no hold upon his fancy. But in reality, and upon the whole, it is as great, probably a greater, pain than the brief bodily smart of a birching. Think of a boy, all

life and energy (as such offenders for the most part are) being confined to the rules and the discipline and the isolation and the necessary mind and limb restraint of a prison for two or three months! Can any person who remembers his own boyhood doubt for a moment that it is protracted torture;—that it is unwholesome alike for mind and body;—that it may, and I suspect does, often inflict permanent injury on both. Can there be a reasonable doubt that, if the pain of such punishment could be added up, the birching would be the lesser and most harmless, as it would certainly be the most efficacious.

But then, say the objectors, whipping degrades. *Does it?* This is disputable in the case of flogging of men. It may be emphatically denied as the result of birching boys.

The birch.

Then it is said, "the punishment is more degrading than the crime?" In what respect? If the punishment prevent the repetition of the offence by the offender or deter others from committing it, the birch, in fact, diminishes the sum of degradation. But in sober seriousness *is* there any degradation in the birch? *Are* the young rascals who make themselves the plagues of the community, whether from wickedness or wantonness, really likely to be so shamed at the castigation they have received that they will not again look up and feel as boys should—or do their companions so loathe them for having been whipped that they are thenceforth outcasts from *their* Society? It is arrant nonsense. In my own school days the birch was freely used—doubtless too freely and unwisely, for it was applied to offences and offenders for which it was not the *appropriate* penalty. But whatever other evils may have resulted from it, certainly mental, moral, or social degradation was not one. I appeal

to all readers who were educated at a public school if he or any friend of his felt himself lowered in his own estimation or in that of his fellows by a birching—or has he experienced in after life the very slightest sense of degradation? The generations that were birched produced as many great and good men —high-souled men—as the sentimentalism of the present time can exhibit or is nurturing. If the public schoolboy was not degraded by the birch, what degradation is it likely to bring to the street Arab, or the area sneak?

Birching for offences of wantonness.

I repeat, therefore, that a *birching*, limited in severity, inflicted under the responsibility of the Inspector of Police at the station, and the discharge of the culprit therefrom without the real degradation of a gaol, is the proper punishment of boys for offences of wickedness or wantonness. No more valuable reform could be made in the administration of the law than the substitution of this fitting penalty for a fine which a boy cannot possibly pay, or a prison, with whose inside he ought never to be made familiar.

I am conscious that in this I am rather suggesting what the law should be, than assisting the reader in the administration of the law as it is. But these remarks may not be altogether worthless if they should attract the attention of some member of Parliament to a question of wide and pressing importance, and induce him to bring it under the notice of the Legislature or the Government.

Nor will it be altogether out of place in reference to Judges and Magistrates. The power to birch boys is vested in them in cases of petty larceny and in the much more serious offence of obstructing a railway. A glance at the reports of the Quarter Sessions and

Police Courts will exhibit a remarkable diversity of practice in the awarding of this punishment. Evidently there is much difference of opinion among the administrators of the law as to the conditions under which they will avail themselves of it. Obviously many prefer imprisonment. Probably they may not have sufficiently considered the indirect consequences of a gaol to young persons. Possibly they may have been unduly influenced by the sentimental appeals made to their emotions rather than to their reason. A statement of the arguments may have the good effect of bringing about a greater uniformity of practice.

Instances of its utility.

That whipping is most effective experience proves. It almost extinguished garotting in six months. A remarkable instance of its potency in restraining juvenile offenders occurred within my personal experience. When I was Recorder of Falmouth, I was informed that scarcely a sessions had passed without cases of boys prowling about the shipping in the harbour and committing petty thefts, inflicting more mischief than loss upon the owners. The magistrates had tried imprisonment under the Juvenile Offenders Act in vain. They had sent the little criminals to the sessions, hoping that a Judge and Jury might be more awful to them. That experiment had failed. At once I took the resolution to try another plan. Four boys were brought before me charged with the same offence. On their conviction I sentenced them to be forthwith birched. They were led from the dock to the prison, at once unbreeched, received each his twelve strokes with a birch rod, and were sent away smarting and crying to their companions. It was enough; the plague was stayed. For four years thereafter there was no repetition of the nuisance.

How to deal with young offenders.

But for offences of wantoness no such effective, because appropriate, punishment is at present provided, and they whose duty it is to administer the law must still ask what, as the defective law is, are they to do with young offenders? The question has much exercised my own mind, and I can suggest no satisfactory answer. Feeling, for the reasons above stated, the most profound reluctance to send a boy to gaol, and having no alternative but a pecuniary penalty that punishes the parents and brothers and sisters and not the culprit, there are but two courses open—to dismiss with a reprimand, which he does not care for *if that is all*, or to place him under recognizances to come up for judgment when called on, with a threat of how tremendous that punishment will be if he offends again. I have heard of a third course, the propriety of which, however, has been much questioned. Even in the few cases in which whipping is permitted the power of the Judge or Magistrate to whip is unwisely limited to boys under the age of sixteen, although it might be desirably extended to eighteen or even to twenty. In these and the cases in which the law has not sanctioned the birch, some Judges and Magistrates have sought to do indirectly what they are not permitted to do directly. The charge is dismissed on a promise by the parent that he will perform what the law has failed to provide—a promise, I fear, more often made than executed. The defect in the law is strongly shown in this necessity for resort to a questionable expedient to secure the appropriate punishment of offences which the law fails properly to punish. But it is a lesser evil than a prison—that is all that can be said for it.

Before this chapter is concluded it may be well to notice another defect in the law. The age to which

Age for whipping should be extended.

whipping is limited is too restricted. The criminal class perfectly understand it, and, as a consequence, every boy protests that he is above the age of sixteen. It is jocularly said by the officials at railway stations that the number of boys and girls just under twelve is astonishing, only less wonderful than the size to which such young persons nowadays attain. With those who appear in Criminal Courts precisely the opposite law prevails, and the manner in which growth is stunted and youth preserved by those who say they are *above* sixteen is marvellous. True, the Juvenile Offenders Act empowers the Court or Judge to form a judgment of the age, and where no evidence of age is given, the power may be exercised. But the question has often presented itself if the power to determine upon view exists where some positive evidence is given, such as the statement of the parent upon oath, although the Judge may wholly disbelieve such statement. In any case the limitation of age is too low.

Boys of eighteen and nineteen are boys still in mind and should be treated as boys. The age to which birching may be advantageously extended should be at least eighteen, and there is no sound objection to twenty.

Ext nt of whipping

The number of strokes with the birch must be prescribed by the sentence. Twelve is the usual number. In very bad cases, as of brutality, or old and hardened offenders, it may be extended to twenty. Between these limits the number may vary according to age or circumstances of aggravation.

In this chapter it is assumed that the offences for which punishments here considered are to be applied are those of *wantonness* rather than of wickedness.

The best practicable restraint is to call upon the arent or some friend to enter into recognizances l 10*l.* to bring him up for judgment when alled on. Recognizances to come up for judgment.

The punishment of juvenile offences of graver complexion will be considered hereafter.

CHAPTER VIII.

II. OCCASIONAL CRIMES.

A VERY extensive class of Criminals and Crimes comes into this category. The name I have ventured to suggest proposes to include the offences to which persons are prompted by impulses more or less immediate rather than by deliberate design. In such cases the crime is induced by the presence of the object exciting the desire to possess it, combined with some real or supposed facility for procuring it. It would have been more strictly correct to have called them "Accidental Crimes;" but that term might be misconstrued, as meaning offences committed unwittingly. Let it be distinctly understood that the offences contemplated in this chapter are those committed under the influence of accidental circumstances, such as sudden temptation and the like, and in which there appears to be the absence of deliberation and dishonest proclivities. This class of crimes excludes that element of deliberation which adds so much to the criminality of an offence. To this category properly belong a considerable portion of the petty larcenies committed by persons who are not habitual criminals. The most frequent motive is the gratification of a desire for drink. They who have had experience in criminal courts are often surprised at the apparent littleness of the temptations that lead to theft, the

Motive to crime.

Kleptomania.

small value of the article taken, the triviality of the gratification to be gained by it compared with the risk of detection and the greatness of the penalty. Such cases, and they are very frequent, seem to confirm the theory of a diseased propensity to steal—the *Kleptomania* of the doctors, which has been so much ridiculed—for nothing but an insane impulse seems to account for such senseless acts. Sometimes it is that the thing taken is worthless; sometimes there is no apparent object for stealing, the thief having ample means to buy what he wants; sometimes the thing selected is the most difficult to be filched; and sometimes an artfulness is exhibited greatly in excess of its object.

Furtiveness.

Such instances appear to point to a mental structure or condition that prompts to theft, not for the sake of *gain*, which is the common motive, but from a positive pleasure taken in the exercise of *furtiveness*. This is quite a different motive from the desire to possess, and it is not an infrequent form of monomania. It is not unknown among men, but it most prevails with women. The Phrenologists recognised it as an excessive development of what they called the Organ of Acquisitiveness. But whether it be or be not the product of brain structure, there is no question that abnormal or diseased minds exhibit such a tendency, and account must be taken of it, not by the Criminal Law, but in the administration of Criminal Justice. A mere mental weakness would not justify a verdict of Insanity. But where the Judge is satisfied that there is such an infirmity, he should take it into account in awarding punishment. The indulgence even of a morbid propensity may be to some extent restrained by consciousness of consequences. Moreover, some ingenuity is usually exercised in the practice of such thefts. I am, indeed, inclined to think that its fasci-

nation consists mainly in the exercise of skill in avoiding detection rather than in a desire for the object so obtained.

This propensity was so powerful with a distinguished and wealthy Countess of the last generation, that her friends pretended not to see her contrivances for pocketing their forks and spoons, and on the next morning her servants returned the abstracted property to the owner. Scarcely a year passes without some woman, respectable, well-educated and well-to-do, being charged with stealing from a counter small articles she could well have paid for, and shopkeepers tell us that a hundred such cases occur to one that is prosecuted.

Treatment.

The existence of such a cause of crime may be suspected from the obvious absence of any other motive. The remedy is not acquittal, for that serves but to encourage the yielding to an insane impulse; nor is it by exemption from all punishment, for that also removes such self restraint as may still be practicable. The object is to restore the mental balance by setting off one emotion against another—the fear of the punishment against the pleasure of the act. The sentence in such a case should not be vindictive. It cannot hope to cure by reform, for the offender is conscious of guilt but cannot resist the temptation. Lecturing will not cure. Fear is the only restraining force and the measure of punishment must be such as to induce that wholesome fear as an antidote to the bad impulse for the future.

Punishment to be determined by the character of the offender.

Hence in this and the like cases the nature and degree of the punishment should be regulated strictly by the circumstances, not of the *offence*, but of the *offender*. The object not being exemplary but deterrent, just so much pain should be inflicted as may be likely

to produce the desired effect—and no more. Such a criminal is more a subject for pity than for reprobation, because he labours under the influence of what is in fact a moral deformity or a mental disease. This affords no plea for acquittal, because punishment is designed to operate, and *is* most powerful in its operation, upon immoral impulses. But it is a plea for so much mercy as may be consistent with the object of preventing the criminal from repeating the crime. Punishments nominally the same vary immensely in the degree of practical severity according to the nature and nurture of the persons subject to them. To one who has occupied a place in respectable society, the associations of a prison make confinement there for a month far more a severe punishment than would be imprisonment for a twelvemonth to a hardened ruffian. Hard labour is almost death to a man not accustomed to it, while what is called such is only child's play to the ploughman. There is no class of cases requiring more discrimination on the part of the Judge or Magistrate than that now under consideration, with a view to mete out such a penalty as shall be at once deterrent and merciful. It can only be done by careful consideration of the history of the convict —measuring the penalty rather by this than by the character of the particular offence.

Inquiry into the convict's antecedents

With the entire class of occasional offenders, the same anxious inquiry into the antecedents of the criminal is desirable. Especially should it be ascertained, if possible, if this be the first offence, for, if it be, and there is nothing in the character of it and of the circumstances attending its commission to give it a bad complexion, it should be treated with the utmost leniency. Wisdom as well as mercy dictates the propriety of giving to those who have fallen for

the first time an opportunity to redeem themselves. How many sin in a moment of weakness or of great temptation who are sorry for their sin as soon as reflection resumes its sway and would gladly, if they could, undo what they have done. It is to these and such as these that mercy from the judgment seat comes almost like a message from heaven, bidding them not to despair but to hope for a future when their offence will be forgotten as well as forgiven. I have wished often that some kind of punishment could be invented for such offenders which, while making them feel that crime cannot be committed with impunity, might save them from the degradation of prison associations. That, I fear, is a hopeless prospect, for social institutions can only draw broad lines of distinction and classify offenders in categories easily determined. But the law has lodged in the Judge and the Magistrate very large discretionary power in the application of its penalties. With a most humane consideration for the class of cases we are now considering it has even gone so far as to permit the discharge of the offender without any punishment at all—or merely to bind him in recognizances for good behaviour.

Recognizance to come up for judgment when called upon.

But there is another proceeding of which I have extensively availed myself for the purpose of meeting the difficulty described. *It is to require the convict to find surety for his coming up for judgment when called upon,* and upon that dismissing him without punishment. The plan has proved entirely successful. Although I have adopted the practice for many years, and in this manner have released a great number of first and occasional offenders from the punishment of their crimes, I have never, save in two instances, had occasion to call them up for judgment, nor to regret the mercy so shown to them. And this, too, in

the Metropolis, where the inducements to crime are so many.

On the other hand I have received most gratifying testimonies to the good results of this manner of dealing with first offenders, especially in the case of young persons.

Inquiry officer in Middlesex.

But cases of this kind cannot be so treated without careful preliminary inquiry into the *antecedents* of the convict, and this should be pursued in every form. Are there any persons in the Court who know him—who can give any account of him? Can he give any account of himself? Who is he? What is he? Has he been at work lately, and with whom? Has he parents, friends, employers? Where are they to be found? Not content with his own answers, inquiry should be made out of doors. At Middlesex Sessions we have an active intelligent officer (Mr. Lockyer), whose business it is to make these inquiries. He takes the addresses of friends and employers named by the prisoner, sees them and obtains all the information he can, which he reports to the Court, the sentence being deferred for that purpose. The constable having charge of the case is also properly instructed to make inquiries about the prisoner, so as to be enabled to inform the Court what his past character and pursuits have been.

Such an investigation takes time and involves trouble. But no trouble is too great that will enable the Judge or Magistrate properly to apportion punishment—at least I hope it may never be so esteemed.

Treatment of first offences.

If this be the prisoner's first offence, and especially if he is young, and has been in employment up to the time of the offence, and his employer appears to give him a character or to befriend him, a very desirable course is to appeal to the employer to take the prisoner

again into his service if discharged without punishment. Such an appeal is rarely refused and in that case the employer should be requested to enter into recognisances to bring up the offender for punishment if called on, for this gives him a claim upon the servant which, I am informed, works with excellent effect.

The advantage of this proceeding over that of a nominal punishment or sureties of the peace is the hold it has upon the prisoner's future conduct and the strong check it imposes upon misconduct. It is impressed upon him by the Judge that if he offends again against the law *in any manner* he will be brought up on this conviction and then severely punished. He knows this to be more than a mere threat. It acts as a continuous bridle upon him of which *he* is conscious, although it may be unknown to others. That it has worked well in my own practice long experience has proved, and I do, therefore, strongly recommend it to others.

Treatment of young girls.

It has been already observed (*ante*, p. 29) how grave are the objections to sending boys and very young men to prison and the consequent preference of any other form of punishment, and that my aversion is greater still to sentencing young girls to imprisonment, as involving moral ruin. The reader will doubtless ask, "What then would you do with them?" This I do. First, I make the same inquiries above described as with other prisoners. If the girl has friends, I ask those friends to take charge of her, binding her over to appear for judgment when called on. If she has no friends who will do this, the Inquiry Officer is instructed to make search for a place, or a refuge, or a charitable institution, or some charitable person, who will receive her. These

exertions seldom fail. But if they should, what then? Still I say, *not a prison*. If she has no present home, I give her in charge to the parish officer. If she is able to provide for herself, I discharge her on her own recognisances to come up for judgment when called upon.

I am aware that most of the prison authorities do not share my objection to making young persons familiar with the inside of a gaol. They point to the teaching, to the feeding, to the clothing, to the care of the health, to the admirable management, to the rules for preventing evil communication. I grant them all, but these rather strengthen than remove my objection. I fear lest the young should learn that a prison is *not* so terrible a thing inside as it looks on the outside and as their imaginations have pictured it. I desire that it should continue to be "a bogey" to them, if you please to call it so, and that the blight of being "gaol-birds" may not too soon fall upon them.

We know how often persons are made to become vicious by being called so. When in every quarrel the once convicted is taunted with being "a gaol-bird," and every jealous rival throws that title in his teeth, and when at any time thereafter a witness in any case in any Court he is harried with questions as to his former crime—it is not surprising that he should at length become what he is called.

CHAPTER IX.

III. CRIMES INVOLVING BREACH OF TRUST.

In the apportionment of punishment it is important to consider the character of the crime for the purpose of ascertaining if it was single or compounded of more offences than one. It is a material aggravation of a crime that substantially it involves *two* or more crimes. The law has to some extent recognised this distinction by affixing greater penalties to compound offences. Thus it has distinguished between simple larceny and larceny attended with circumstances of aggravation. Breach of trust is one of these. Hence larceny by a servant is taken out of the category of simple larceny and a more severe punishment is provided. But this increased penalty is only permissive. The law does not prescribe the larger penalty, and to the Judge still belongs the duty of meting out the punishment he may deem to be deserved by the general character of the offence and the special circumstances of the particular case.

Compound offences.

Crimes involving breach of trust are conspicuous examples of the absurdity of the existing legal classification of crimes. Larceny by a servant is felony; larceny by a trustee or agent is a misdemeanour. If I give my servant a sovereign to carry to my butcher to pay a bill and he puts it into his pocket and applies it

Insufficiency of the law.

to his own use the law pronounces him guilty of felony. But if I send 1000*l.* to my Attorney to complete a purchase, or to my Broker to buy stock for me, and he pockets my money and applies it to his own use he is guilty of a misdemeanour only. Morally and socially the thieving Solicitor or Broker is infinitely more guilty than the thievish errand boy. But that which the illogical law has failed to do the Judge must do. He cannot direct the jury to make that felony which the law has made a misdemeanour only; but he may and ought to take into account the character of the offence in resolving what mitigation of the legal sentence would be fitting under all the circumstances of the case. Hence he should *add* to the punishment he would have inflicted for simple larceny so much more of penalty as would be deserved by the added guilt of breach of trust, the degree of that guilt being measured by all the attendant facts, such as the extent of confidence reposed in the thief—the relationship of the parties—the arts, if any, employed to win the trust that has been so betrayed—if there were any and what untrue representations—if accounts have been falsified—if the offender had availed himself of special opportunities obtained by reason of the confidence placed in him—and, above all, if it was a first offence or only the first detected of a series of crimes. All of these considerations should be weighed by the Judge in determining the punishment, which he should endeavour to estimate by mentally apportioning so much to the act of larceny, and so much more to the breach of trust by which it was aggravated morally and legally, this latter being measured according to the various ingredients of criminality above named. Better still it would be if he were to set down the several items of aggravation

Duty of the Judge.

in his note book, with the calculated penalty placed against each.

Limitation of charges.

The law allows only three charges to be laid in one indictment for larceny or embezzlement by a servant, and these must have been committed within six months. Consequently the inquiry at the trial is limited in its scope, and whatever the extent and duration of the wrong, the attention of the jury is strictly limited to the three cases so charged. But *after conviction* the inquiry of the court may be properly extended, in order to inform itself what sentence the case requires. Robberies by servants have invariably special features resulting from the relationship. If a thief comes from without, he carries off all he can find. A servant who thieves takes only a small quantity at once, because small quantities are less likely to be missed and provoke inquiry; they are more easily removed or concealed and he can repeat the plunder as often as he pleases. On this account the law is seriously defective in limiting charges of larceny by servants to three in number, or to six months in time. Robberies by servants are in fact a continuous plundering and should be permitted to be charged and proved *as such*. Grievous miscarriage of justice frequently occurs by reason of this defect. For instance, a shopman has stolen money from the till by very small sums day by day; a servant carries with her a small parcel of stores each time she leaves the house. Each taking was trifling, but the weekly, monthly, yearly total amounts to a formidable sum. The mischief of this defect in the law shows itself thus. The employer has been robbed of 50*l.* in sixpences, but the law does not permit more than three separate takings of three single sixpences to be charged in the indictment, and the fact that these three sixpences

Robbery by servants.

were only fractions of a great system of plunder is carefully concealed from the jury. There may be difficulties in the way of proof of the particular takings charged and then there is an acquittal. Even, if proved, the plea is always powerfully urged upon the jury that the money or thing taken is trifling, and eloquent appeals are made to them not to ruin the prisoner for the sake of sixpence. And these are very often successful appeals. The jury are astonished if they learn afterwards that the three sixpences, whose history alone they were permitted to hear, were part only of a much more formidable thieving which, if they had known, would certainly have altered their view of the character of the petty larcenies they had dealt with so leniently.

Suggested amendment of the law.

A very great improvement would be effected in the law by permitting, in cases of larceny by servants and of embezzlement, the whole of the property taken to be charged and proved, without reference to the times of taking, treating the crime in form, as it is in fact, as a continuous offence. Whether 20*l.* be taken at once, or by a shilling a day, in no way affects the character of the crime, which is in substance that the offender, being a servant, availed himself of the trust necessarily reposed in him as such to rob his master of 20*l.*

Duty of the Judge or Magistrate.

But until this defect in the law shall be cured, the Judge or Magistrate will do well to bear it in mind and endeavour to counteract the mischief that results from it. He should impress upon the jury this characteristic of robbery by servants, that it is for the most part accomplished by small takings often repeated and that therefore the small value of the particular article charged in the indictment is in such cases not the true measure of criminality. Robberies by servants

being always easy of execution and comparatively safe, it is not at all probable that detection has followed upon the first offence. If thus instructed by the Judge, the jury would not be so often misled, as now they are, by the eloquence of counsel pleading the apparent pettiness of the theft for which the prisoner is prosecuted.

Measure of punishment.

In measuring the punishment of a dishonest servant it is necessary to inquire closely into the history of the prisoner. The prosecutor should be called upon to state how much and what he has lost, and especially over what length of time the depredation was known to have extended; how long the prisoner had been in his service; if he received a character with him and particularly if that character was found to be genuine or fictitious. The principal offenders in this way are shopmen and shopwomen, barmen and barmaids, and domestic servants. With respect to the former, an inquiry is often made of the employer in the witness box if any and what checks were used to prevent dishonest appropriation of money received in the shop, as if it was thought that guilt depended upon that. The late Mr. Shoolbred was once before me as a witness when this question was put to him, and he stated that he had exhausted ingenuity in contrivances to prevent robbery by persons serving customers, but all devices had failed, the skill of the thieves in evading them always keeping pace with the skill in their construction. No precaution yet invented could secure the employer against robbery by collusion of servants and he believed it to be impracticable.

Improper questions.

There is another question often put to the employer by the Counsel for the prisoner which cannot be too strongly deprecated. It is an inquiry what were the

prisoner's wages, implying and intended to imply that, if he was not paid so much as the jury might think he ought to have been paid, he was justified in robbing his employer. Such an argument is not advanced directly, it is true, but very often it is indirectly addressed to the jury and not always without effect. But it should be sternly and instantly discountenanced by the Court. Nothing can be more mischievous in its effect upon servants generally. It tells them, almost in so many words, "If you are not satisfied with the wages you receive you may steal to make them good." Such an excuse will be greedily seized upon by many who have a lurking desire to indulge themselves at the cost of the till. Wheresoever this argument is used or implied by Counsel in his address to the jury, the Judge should make a point of denouncing it with the firmest language of disapprobation.

Ingredients in the punishment of dishonesty by a servant.

The sentence on dishonest servants is to be determined by all the considerations urged above, namely:

First, what would have been imposed had it been a case of simple larceny?

Second, an *addition to* that sentence of something more by reason of the *breach of faith*—such addition being determined by all the circumstances of aggravation or of mitigation that attend it;—the aggravation being, the extent of *confidence* reposed; the *manner* of the taking, if with more or less of *art;* the *time* over which the plundering has been pursued; the total *sum* taken; the previous *character* of the criminal; if the place was obtained and the opportunity provided by any *false* representation.

Robbery by trustees, agents, &c.

We now come to the second of the two great classes of crime associated with breach of trust, viz., robbery by trustees, agents, and others entrusted with money or property for a specific purpose, who instead

of applying it to that purpose, criminally appropriate it to their own use.

Although the greater portion of these offences were until a recent period exempt from the Criminal Law and now are mildly termed Misdemeanours only, it will be the duty of the Judge to apportion the punishment according to the degree of criminality that properly attaches to the offence.

Former state of the law.

Bailees, Agents, Trustees and Partners, were formerly exempt from the law of larceny, by reason of the legal definition of that crime as being the *taking from another against his will*, with intent to convert to the use of the thief. This involved the conclusion that when the possession of the property was voluntarily passed by the owner, it was not taken out of his possession against his will and therefore was not larceny, whatever the subsequent misappropriation. Upon this a multitude of nice questions have arisen as to the precise means by which the possession was obtained and if these offences were larceny or obtaining by false pretences only. But the effect was that bailees, trustees, and other agents misappropriating property intrusted to them enjoyed a practical impunity. Servants even were brought within the meshes of the criminal law only by the legal quibble that, inasmuch as the possession of the servant is the possession of the master, when the servant converts the property to his own use he takes it *out of* the constructive possession of the master.

The present law.

The line is now drawn with tolerable clearness and accuracy. It may be stated generally that, if property be given to another to hold *pro tempore*, as a carrier to convey, and so forth, and he applies it to his own use with intent to deprive the owner of it unlawfully, he may be convicted of larceny as a bailee. If a Solicitor,

a Banker, a Broker, or other Agent, receives money to be applied to a specific purpose, or to be dealt with in a particular manner, and he misappropriates it, he is guilty of an indictable misdemeanour.

Duty of the Judge.

In all these cases it is incumbent upon the Judge to inquire fully into the whole circumstances of the transaction before he determines the punishment. These offences from their very nature differ greatly in the degree of their criminality. Account must be taken of the relationship between the parties. The amount of confidence reposed in the offender is a most important ingredient in determining the degree of guilt, for the greater the confidence that has been bestowed the greater the wrong done by the breach of it. Much also must depend upon the nature of the connection. All of us are obliged to trust more or less to the honesty of ordinary bailees in ordinary matters, and we count upon a certain amount of risk in doing so and guard ourselves accordingly. It is otherwise with Solicitors, Trustees, Brokers and other Agents in the *business* of the world. It is practically impossible to avoid entrusting them with valuable property. They trade upon their honesty. They sell their trustworthiness. If they prove dishonest, their offence involves a very high degree indeed of criminality and calls for great severity of punishment, if only by way of example to others who may be inclined to avail themselves of opportunities that require no art but only daring. The guilt of such criminals is increased by the fact that they know the law, must have been conscious of the crime they were committing against the public and the wrong done to the prosecutor, and must have effected their purpose deliberately and with a full knowledge of the consequences. It is highly creditable to the Brokers and

Operation of the law in diminishing the crime.

Solicitors that, since the passing of the law, so few offenders have been brought to punishment. It proves the truth of the argument advanced by those who have made criminal law a study, that its efficiency cannot be measured by the number of convictions under it so much as by the absence of them. Its object is not punishment but prevention by fear of the punishment, and the most effective laws are often those which appear to be the least frequently called into requisition. It is notorious that, previously to this wholesome law, Agents were continually plundering their principals. When a Solicitor failed, he was commonly found to have applied to his own use moneys confided to him by clients for investment, or received by him for them, and which it was his duty to pay to them as soon as received. Instead of this, he had passed the cash to his own bank account, mixed it with his own moneys, used it for his own purposes, and finally robbed his unfortunate client of the property he had so dishonestly appropriated, often to the ruin of entire families. The law has now made this a criminal offence in fact, as always it was in morals, with the admirable effect, not of bringing to trial and punishment a number of dishonest men, but of deterring from becoming dishonest men who would not have been restrained by any less terror than appearance in the dock of a criminal court, with the prospect of penal servitude or long imprisonment. But, when such a case does occur, the Judge has a painful duty to perform. The convict, from the nature of his offence, is often a man of education and social consideration. He differs much from the ordinary class of criminals. The punishment, though nominally the same as that pronounced upon a common thief, is really doubly as severe upon him because of his antecedents, and this should be

Punishment.

taken into account. But, on the other hand, it is to be considered that his crime is the greater because of his better education and higher social position, because of his having invited confidence by his profession, obtained it in the character of trusted adviser, and betrayed that confidence. These must be weighed in opposite scales. The punishment in nominal degree and in reality should be greater than that of the ordinary thief, account being also taken, with a view to yet higher penalty, if the case has been aggravated by anything in the shape of *systematic* dishonesty. If the crime had been often repeated, extended over a considerable time, or had been committed towards more persons than one, it is to be treated with an additional severity proportioned to such aggravation.

Distribution of sentences.

A great improvement would be made in the criminal law if sentences were to be distributed in accordance with certain recognised ingredients of aggravation. If, for instance, the crime of robbery by a servant, instead of being visited with one sentence for the entire offence were required to be apportioned—for the larceny so much, and so much more because the offender was a servant, and, therefore, guilty of breach of trust in addition to the larceny. The effect upon the minds of those whom to deter from crime by fear of the consequences is the proper purpose of punishment would be very striking. They would never read the report of a trial of a servant but they would see that the law had inflicted so much more of punishment by reason of the breach of trust, which now is rarely alluded to in pronouncing judgment and certainly does not *appear* to enter into the sentence. The law should, in explicit terms, distinguish between the punishment for the larceny, simply as such, and the punishment added by reason of the added wrong of the breach of trust.

The Judge would then be required so to announce in his sentence. Instead of saying, as now : "The sentence is that you be imprisoned and kept to hard labour for nine months," he would say, "The sentence is that for the larceny you be imprisoned for six months and, because it was committed by you as a servant and in breach of the trust reposed in you as such, that you be further imprisoned for three months." Nothing is more important in the administration of criminal justice than that degrees of guilt should be accurately measured and the punishment attached to each degree of criminality specifically known. The lawyers who listen are aware that the law has imposed a higher penalty on larceny by a servant. But this is not known to the outside world. Nothing appears in the course of the trial or in the result of it to mark the distinction in the sentence and therefore it is lost as an example.

This suggestion is equally applicable to other offences where increased punishment is affixed to guilt aggravated by attendant ingredients in the crime. In none of them is this marked by the sentence. It should be distinctly indicated in passing all sentences.

CHAPTER X.

IV. CRIMES OF FRAUD.

Defects in the law of fraud.

By a strange caprice of our law crimes of fraud are classed as if they involved a less degree of criminality than the crimes classed as felonies. They are not termed "felonies," but designated by the milder name of "misdemeanours."

At the close of this chapter I shall avail myself of the opportunity to direct the serious attention of the reader to the present defective state of the law relating to frauds, with the grave consequences resulting from that defect, and to suggest a remedy. For the present my proper business, in pursuance of the design of this little book, is to consider what Judges and Magistrates should do under the provisions of the law as it is.

Province of the Judge.

Fortunately for society, although but a fraction of those offences which the law was designed to suppress by punishment can be brought within its grasp, Judges can supply some of the defects of the law when dealing with cases which the unskilfulness of the offenders may have subjected to their jurisdiction. The clumsy and vulgar frauds that present themselves to ignorant cunning, such as obtaining goods from tradesmen by the false pretence of having been sent by a customer, and such like, are easily guarded against, readily proved, and the law gives small chance

of escape. But the more elaborate frauds, which are the result of education, and with which society is teeming because the law allows to them a practical impunity, rarely bring the criminal to conviction. When by a happy chance he becomes careless, or miscalculates his scheme, and is convicted, there is imposed upon the Judge the duty of dealing with him in some measure according to the actual degree of his guilt.

Aggravation of crimes of fraud.

In all convictions for fraud, or crimes involving fraud, the first consideration in the measurement of guilt is that they involve *deliberation*. A man may be induced to an ordinary larceny by some sudden temptation of urgent want, or what the poet has termed "that devil opportunity." He may be a half-idiot, or half insane, or thrown off his moral balance by drink—none of them excuses in *law*, or which the *law* could safely recognise, but which *do* affect more or less the degree of *moral* guilt and therefore to be considered in apportioning punishment. But all of these excuses are absent from crimes of fraud. They must be planned beforehand, and therefore are deliberate: they require the exercise of skill to plan, and therefore cannot be the doing of the ignorant or the idiot. The full conception of the crime he is about to commit cannot but be present to the mind of the perpetrator, and he has ample time for reflection upon the wrong he is doing, the risk he runs, and the consequences of detection.

They involve deliberation and skill.

Every element that goes to the *aggravation of guilt* is thus present to crimes of fraud and should be taken into account by the Judge in measuring the sentence. Happily the law has not in all cases extended the same restriction to the punishment of the offender that it has given to the name, definition

and proof of the offence, so that a considerable latitude of penalty is allowed to the Judge, of which it is his duty to avail himself.

Measure of punishment on fraud.

In meting out the punishment to be awarded, the Judge should consider, not merely the above described ingredients of guilt, which are involved in all crimes of fraud, but also the special circumstances of the particular offence. Most important of these is the question, which should always be well sifted, whether the crime was part of an elaborate *system* of fraud; if it had been practised upon others, and to what extent, and with what results? The next inquiry will be, if it has been long continued with impunity? Then, how many persons had been robbed by it and the amount of such robbery? Then the degree of skill and contrivance exhibited in the conduct of it?

Antecedents of the convict.

Another necessary inquiry relates to the history of the convict; his antecedents in reference to his manner of living, his position in society, his education, his pursuits, his character, his reputation. These are important considerations in determining his punishment. The information is not so difficult to obtain as may be supposed from the mere statement. Usually the convict is known to some persons about the Court who should be invited to inform the Judge, and, if necessary, sentence should be deferred to a future day that proper inquiries may be made.

Distributive sentences.

Here also, as in the case of offences aggravated by breach of trust, it would be most desirable if the sentence could be made distributive, so much being apportioned to the offence, and so much to each of the circumstances of aggravation that attended it. But there is no present prospect of the adoption into our criminal law of so great an improvement, among many others that are required, and therefore the Judge can

only inflict an increased punishment proportioned to such items of aggravation and so to inform the convict, and through him others who may be inclined to pursue the like evil courses, the reasons for his judgment.

The cases of obtaining by false pretences, that constitute the great majority of those which the law is strong enough to grasp, differ so little in the degree of guilt from ordinary larceny as to call for a slight increase only of the punishment. The references above suggested are applicable for the most part to those more complicated forms of fraud which are yearly multiplying as education extends.

Frauds of "the long firm."

But there is one of a very formidable character that calls for a brief notice. The fraud has been organised into a system. The perpetrators are known as "the long firm." They answer advertisements in *The Times*, sending orders to tradesmen and others in feigned names, and with addresses that are represented only by a hired door where letters are received. The goods are forwarded but no money is returned. Another contrivance of the same fraternity is to take a shop, send out extensive orders, immediately pawning or selling the goods so procured, and then they disappear. The defence always in such cases presented to the jury is that the defendant was a *bonâ fide* trader. The answer to this is, that the *bonâ fide* trader does not convert his stock into cash at a pawnshop as soon as it is received, nor close his shop a week after he has opened it.

Great difficulties impede proof in the case of the "long firm." It is difficult to prove the sending of the orders by the defendant, or the receipt of the goods by him, or that they were not intended to be paid for. Hence the infrequency of convictions. But

when these obstacles to justice are overcome and a conviction is obtained, the duty of the Judge is plain enough. He must visit the offence with exemplary punishment. It possesses every feature of aggravation and calls for no mercy. It is not one crime but a multiplication of crimes. In fact, the robbery is not of one but of many, and was planned and executed with a full intention to rob many. Conviction should, therefore, invariably be punished with *penal servitude*, even if it be a first conviction only, for although this may be the first *detection*, beyond all question it is not the first, nor the only crime *committed* or planned.

By worthless cheques.

Another form of fraud demanding exemplary punishment is the passing of worthless cheques—the prisoner having no account at the Bank, or no effects actual or expected—and with deliberate intention to defraud. The common practice is to buy a small quantity of goods and then to tender in payment a worthless cheque for a considerably larger amount and receive the balance in cash. In such cases the invariable practice should be to apportion a definite term of imprisonment to each proved offence charged in the indictment, making the terms consecutive. If it should appear that the frauds have been extensive and long continued, penal servitude will be the appropriate penalty.

Defective state of the law relating to frauds.

So far we have been considering how the existing law should be administered and the principles that should regulate the apportionment of the punishments it prescribes. But I cannot close this chapter without inviting the attention of the reader, whether Legislator or Lawyer, to the very defective state of the criminal law relating to Frauds, because it is fraught with incalculable mischief to the community, not merely by the wrongs it suffers to be practised with impunity,

but by the encouragement that consciousness of impunity gives to crimes of this class, and the many persons who are thus tempted to become criminal. It is notorious that for some years there has been growing up a new class of offences for which the law has provided no adequate means of repression. Crime by fraud is becoming daily more abundant, because it is found to be safer as well as more profitable than crime by theft or violence. Education has wrought this change. It is one of the evils which appears to be attendant upon all human progress. It is, of course, a popular fallacy that education, *per se*, is a cure for crime. Education does not in any manner change the moral faculties. The "three R's" alone but give to the evil disposition a greater desire for self-indulgence and more skill for the gratification of it by dishonest means. Geography and grammar do not change the *man*. Knowledge of the sciences is only a weapon of mischief in hands that are not instructed by religion how to use it. To teach all *except* religion is practically to teach the child that religion is the one thing *not* necessary for him to learn. Education changes the direction of crime not its amount. It substitutes caution, cunning and a preference for stratagem as being more sure and far more safe. Its operation for good is indirect. A man who can neither read nor write and who, therefore. is called an ignorant man, may nevertheless be as honest and as good a man as the most highly educated. Crimes of dishonesty are the product of selfishness. They proceed from the wish to possess without the labour of acquisition by honest means. Few steal for the mere pleasure of stealing, but to gratify some desire or to supply some real or supposed want. As the first and invariable result of

Effect of education on crime.

education is largely to increase a man's wants, the immediate effect of it is to increase the inducements to crime among those who have not the means wherewith to indulge those wants. Hence education without the restraints of religion, so far from being a cure for crime, as some enthusiasts imagine, is more likely to multiply it. But under any circumstances education changes *the direction* of crime and substitutes crimes of fraud for crimes of vulgar larceny and violence. With rare exceptions, which are in fact the product of moral deformity or positive disease, and for which, therefore, the criminal is not morally responsible, crimes resolve themselves in two great "classes," (1) crimes committed for the indulgence of *passion;* and (2) crimes committed with the object of *gain*. Education certainly has the effect, if not of suppressing the emotion, of repressing the expression of it. The untaught man has not before him the keen perception of consequences that makes the taught man hesitate to gratify his present passion, and that pause, however momentary, suffices in the majority of cases to stay the hand. This is the rationale of the effect of education upon crime which has perplexed so many of our ethical philosophers. Therefore, also, it is that education fails to produce the same effect upon the second class of crimes—those committed for the sake of *gain*. Education has no influence by way of repression upon that grand motive of human action—the desire of gain. On the contrary, its tendency is to stimulate that desire and this it does in many ways. It implants and cultivates more wants, ideal as well as real. It gives a distaste for the hard manual work of the plough and the spade upon which, after all, man is dependent for his subsistence. The school-taught girl

pants for more genteel and more liberty-giving employments than those of the nursery or the kitchen. The boy longs to be a clerk, the girl to be a milliner. But as competition for these employs multiplies, the struggle for honest life in cities grows more intense. The thirst for the enjoyments remains after the means for gratifying them have departed. Then comes, therefore, temptation to gain by indirect ways the ever alluring pleasures that cannot be procured directly. The ignorant seeks to supply his cravings by the coarse methods for which he has capacity—street robbery with more or less of violence—stealing from shop doors, sneaking in areas, burglary over balconies, But the better taught find that their education, designed to serve them in a better sphere, can be of equal service for dishonest purposes, and their improved intelligence tells them that these are more safe and sure than vulgar thieving. They deliberately concoct *frauds,* for which the structure of society affords them an unbounded field and fatal facilities. Hence the increase of *that* form of crime, which the spread of education has fostered rather than repressed, and which will certainly increase with the increased multitudes whom education is sending from the ranks of manual labour to swell the crowd of aspirants for those less laborious occupations which education is supposed to have fitted them for.

The law has not kept pace with social changes.

Unfortunately the law has not adapted itself to these changes in the condition of Society and it remains almost as it was when its protections were required against immoral gain procured by violence or theft and but rarely against crimes effected by fraud. Still the one is designated *felony* and the other *misdemeanour* only, as if robbery by plain prigging was more of a moral and social offence than

robbery by trick. Call it by what name we will, quibble as we may over nice distinctions of methods, the obtaining by one man from another man of money, goods, or chattels to appropriate them to his own use, with intention to deprive the owner of them wrongfully, is *robbery*, and the term should be plainly applied by the law to all such offences, whatever the particular process by which the crime is effected, and the punishment should be proportioned to the degrees of wickedness attending the different forms by which this robbery is accomplished—as simple theft, robbery by violence, robbery by a servant, robbery by an agent or trustee, and robbery by fraud—this last being the worst, save one, viz., robbery by violence, because it involves all the other elements of guilt, with the additional aggravation of skill, deliberation, and plundering of many instead of one.

Proposed amendment of the law of fraud.

The true and complete reform of this grievous defect in our criminal law should be effected by the abolition of the existing absurd distinction between felony and misdemeanor, and by adopting an entirely new classification of offences. The old grounds for the existing distinction have been already removed by the Forfeiture for Felonies Act. But there is no probability of such a large reform of the Criminal Law being accomplished for some time to come, and as the matter is urgent and an amendment of the law of fraud is of pressing importance to the community, it would be prudent to direct the attention of the Government and the Legislature to a reform very short, very simple, very intelligible, very much demanded, very practical, and very easy of accomplishment.

The want of power in the law to grapple with the ingenuity of criminals arises not so much from the language of the law itself as from the interpretations

that have been put upon it by the Judges. The words of the statute would appear to the common mind to be sufficiently comprehensive, If any person shall "*by any false pretence*" obtain, &c. But the Judges have restricted this to a false pretence of an existing fact. It has been held not to extend to a false pretence of something to be done or to happen in the future. Then there are difficulties in the framing of indictments and in the way of proof, by reason of limitation of the evidence to the particular case, whence it arises that, although the fraud may be patent when the whole of the prisoner's history is taken together, it may be very difficult to prove when the evidence is limited to two or three solitary facts. (*a*) The proposition for amendment of the Law of Fraud which I ventured to submit to the Law Amendment Society was that the definition of the crime should be improved by the substitution of the term "by any fraudulent device," for the present term "any false pretence." This appeared to me to forbid thereafter any such restrictive constructions as those that had emasculated the existing statute and given practical impunity to so many flagrant frauds. In such case the proof would be of a scheme, no matter what, fraudulently devised for the purpose of defrauding another. This was generally approved. My impression *then* was that the Indictment should charge the nature of the fraud, so far, at least, as to inform the defendant what is the particular fraud of which he is accused, otherwise (as it appeared to me), he might be put upon his trial not knowing what he has to answer. It was objected by some of those who spoke upon the question that the Court would

Definition of the crime.

(*a*) A recent decision has somewhat extended the former narrow construction of the law by permitting proof of other like frauds to show the fraudulent intent.

still have to determine what is a fraudulent device within the meaning of the Act, and thus a way would be opened for restrictions equally fatal with that which had marred the present law, and I could not but admit the existence of this danger.

Suggestions by Mr. Greaves, Q.C.

But I am indebted to Mr. GREAVES, Q.C., the eminent writer on Criminal Law and the author of the Criminal Law Consolidation Acts, for a suggestion that removes all difficulty. Why not, he says, apply to crimes of fraud the same simplicity of language in the definition and brevity in the charging of them that is found to work so well with the crime of larceny. In fact, let us attempt no definition of fraud beyond the simple term that expresses precisely our meaning and admits of no legal refinements. We punish the crime of stealing by a statute which states the offence thus: "Who shall feloniously steal, take or carry away." Why not in like manner meet the crime of fraud by the term "who shall fraudulently obtain." What danger to any honest man can lurk in such a definition? Fraud is a fact equally with theft and must be determined in like manner by a jury. In both there are two questions and two only. In *larceny* it is, "was the property taken and with intent to steal it?" In *fraud* it is (or should be), "was the property obtained by a fraud and with intent to defraud?" The fact that fraud is but a more elaborate contrivance to procure wrongfully the property of another, with intention to appropriate it, neither alters the nature of the crime nor demands more particularity in the definition of it.

Proposed indictment for fraud.

So with the framing of the charge in the indictment. In larceny it charges merely felonious stealing. No particulars of the offence are stated, but only the name of the person robbed, the time (which is not required to be proved) and the articles taken, of which

it suffices to prove any one. In practice no difficulty nor any wrong to the defendant has ever arisen from this generality of averment. Let the indictment for fraud charge merely that "A. B. did fraudulently obtain, &c., from C. D. with intent to defraud." The jury will then determine three things: 1st, Was it a fraudulent contrivance? 2nd, Was anything obtained by that contrivance? 3rd, Was it contrived with intent to defraud?

It had been an impression upon, or rather a tacit assumption of, my mind (probably from long habit of recognising the requirement of the existing law), that the false pretence should be set out in the indictment, in order to inform the defendant what was the precise nature of the offence charged, that he might be prepared to answer it. Therefore I did not suggest a departure from this practice, but proposed to give to the Judge very large powers of amendment. But Mr. Greaves has completely removed any doubt I had felt as to the fairness of such a general charge. He writes to me that the prisoner is never put upon his trial until the charge has been fully investigated before a magistrate. Therefore he knows precisely what it is. He knows also what he has done and what he has not done and therefore is not taken by surprise. The depositions, to a copy of which he is entitled, give him better information than any indictment what is the precise offence charged against him and enable him to prepare his defence. A further safeguard may be extended to him by permission, on due application, to have a statement of particulars of the charge supplied by the prosecution. These precautions make surprise impossible. But lest such a case should by some remote chance occur, the Court might be vested with a further power to adjourn the trial at any period of it,

so as to give the defendant time to prepare a defence against a charge unexpectedly sprung upon him.

I have, therefore, arrived at the clear conclusion that the crime of fraud may be adequately punished by describing it in the statute as "fraudulently obtaining" merely, and charging in the indictment merely that he did "fraudulently obtain."

Proof of a series of frauds.

Another provision necessary to the accomplishment of the object of an amended law is that the prosecutor should be permitted to prove not one, nor two, nor three acts of fraud only, but where the crime is one in which the fraud is *from its nature* practised not upon a single individual but upon many, it should be permitted to charge in the indictment specifically a scheme or system of fraud and to prove any number of acts of the same nature.

Extension of the *Forfeiture for Felonies Act.*

The provisions of the *Forfeiture for Felonies Act* should be extended to crimes of fraud, so as to enable the Court to order restitution and compensation. The punishment for all frauds should be extended to penal servitude for not more than five years for the first offence, or to imprisonment with or without hard labour for not exceeding two years, or to fine with or without imprisonment—and for a second offence to penal servitude for not exceeding fourteen years. The Court should be empowered to assess the damage done to the prosecutor and to order compensation to be made out of any property the prisoner may possess. He should also, if required, find sureties for good behaviour. The Court should likewise be empowered to order payment of a reward to any persons who had been active in the detection of the fraud or in the prosecution of the criminal (as now in prosecutions for felony), and also to order that the costs of the prosecution shall be paid in the same

manner as prosecutions for felony are paid, having been duly taxed by the officer of the Court.

Such a statute might be contained in ten or twelve sections and would be accepted by Parliament almost without objection. Of its efficacy in preventing much of the prevailing and fast growing crimes of fraud no practical man can entertain a doubt.

Operation of such an amendment of the law of fraud.

The manner of its operation is, however, to be well considered. Its beneficial working would be seen, not so much in an increase of prosecutions and convictions for fraud as in the great and immediate diminution it would cause in the *commission* of frauds. The contrivers of fraudulent schemes are of quite another class from the practitioners of theft and other coarser forms of crime. They are for the most part cautious as well as skilful. They calculate precisely the amount of risk they run and look closely at the law and mould their plans so as to keep themselves just without its grasp. The present state of the law enables them to do this with little danger, thus operating practically as an encouragement to crime. They know what the *un*wisdom of our Courts has decided in their favour, and they avail themselves of the assistance which the law itself gives to them by its narrow definition of the crime, which has been measured not as crime should be by the object and intent with which it is committed, but by some vague fear of its embracing something that is not criminal. Judges and Juries may surely be trusted to say whether a scheme was fraudulent and if it was planned and executed with intent to defraud. The obvious test of this is to ask if the alleged scheme was *bonâ fide?* If it was designed to impose upon others, so as to induce them to part with their property without the *quid pro quo?* If the property *was*

so obtained and actually applied by the defendant to an honest purpose? This would be the course of such a trial. The prosecution would be required to prove the alleged false pretence and that the property was obtained by it. The law would then *presume the fraudulent intent* from the faudulent act and throw upon the defendant the burden of proof that, although apparently a dishonest transaction, the property was in fact obtained by honest means or applied to an honest purpose. If honest, the defendant would have no difficulty in accounting for the property he had received and showing how it was disposed of and why it was not restored to the owner. The better to enable the innocent to do this, the law might be further improved by permitting the defendant in such case (*as he should in all cases when the burden of proof is on him*) (*a*) to tender himself for examination on his own behalf.(*b*)

Burden of proof on the defendant.

(*a*) I would suggest this as the proper solution of the problem as to the propriety of admitting the evidence of the accused in criminal cases.

(*b*) Something of the same line of reasoning will be found of much practical utility in summing up to a jury in cases of obtaining by false pretences, which are often difficult to be explained in their technical form. It may be put to them thus: After stating the charge, proceed to this effect. "The question for you is (1), Whether the defendant obtained the money by the representation stated? (2) Was that representation true or false? (3) Was it so obtained with intent to defraud? Assuming that you say "Yes," to the two first questions, there remains the third. To this it is answered, that there was no intention to defraud, and that is for you to say, forming your judgment on all the circumstances of the case. Look at it with the eye of common sense. You start with this fact; the prosecutor lost his money; the defendant got it. Has he returned it to the owner? If not, why not? Has he accounted for it to your satisfaction? Has he shown you what has become of it, where it is now, why it has not

The good effect of such an amendment of the law relating to frauds would be found in this—that men who have position or property to lose, seeing how large is the scope of that law, would carefully examine all schemes with which they connect themselves. There are multitudes of men who would not fear a civil action, or who would defy any civil remedy to which their victims can resort, who would yet shrink with terror from even the possibility of having to answer for their conduct in a criminal court, with the prospect of a prison or penal servitude.

Inequality of the existing law.

The Judge who tries a boy for stealing a loaf or a poor rogue for picking a pocket of a handkerchief, and records his conviction for felony, and punishes him as a felon, cannot but be painfully conscious of the unsoundness of the existing law when the next defendant who appears in the dock is a man who can plead in excuse neither ignorance, nor pressing want, nor sudden temptation, but who, being educated and *because he is educated,* has deliberately planned an elaborate fraud by which he has robbed, not one person only, but a hundred persons, and not of the value of a few pence only but of hundreds of pounds. Not less is it revolting to him to hear this great wrong called a *misdemeanour* only and the wholesale plunderer politely termed "the defendant" instead of "the prisoner", as the other was, and the punishment imposed by the law probably limited to imprisonment. Nor is this all. The law, as interpreted, has provided for such an offender extraordinary facilities for escape by the difficulties it has thrown in the way of proof, combined with the natural reluctance of a prosecutor

been restored? If honestly received it can be honestly accounted for. Failing this, the reasonable conclusion is that the dishonesty was designed."

to incur the cost and harass that attend the pursuit of justice under difficulties which prudence dictates to him not to hazard for the sake of punishing a rascal whose repression is more important to the community than to the individual victim.

CHAPTER XI.

V. Crimes of Passion.

The characteristic of crimes of this class is sudden impulse—absence of deliberation.

Imperfect legal definition.

They range in magnitude from almost the greatest to almost the least of offences. Murder and common assault, the most unpardonable or the most pardonable of crimes, come within the category, as the law defines them.

A definition that could embrace two such extremes must be manifestly defective, and the law based upon it cannot be in a condition that commends itself to the reason of the jurist or the common sense of the community. Consequently, in practice, it is ignored alike by Judges and by Juries. The latter, at all events, will not recognise the delicate distinctions which the former have drawn between murder, which reason defines as an act done with malice aforethought—in other words, *deliberately purposed*—and an act done under the impulse of passion, often greatly excited, and while the passion is still raging, even though there has been that interval for repentance which has been held to convert manslaughter into murder. Happily, in jury estimation, malice aforethought means what it is—*deliberation*—and no instruction that deliberation in law means something else, whatever the subtlety of the distinction set before them by the Judge, will induce Juries to

call that "murder" which was really the result of sudden passion and not of malice *pre*pense.

Peculiarity of crimes of passion.

Crimes of passion possess this noteworthy peculiarity, that the *legal guilt* differs widely, in many if not in most of them, from the *moral guilt*. Crimes committed under the influence of passion do not, like crimes of deliberation, of necessity indicate *moral* degradation. The utmost they prove is the absence of that self-restraint which it is the duty of men to cultivate, but the exercise of which is much more easily preached by those who have no fiery passions to bridle than observed by those unfortunately endowed by nature with strong emotions.

Homicide.

The law, therefore, cannot draw the same distinction in dealing with crimes of passion which it endeavours to do, with more or less of success, in dealing with crimes of deliberation—namely, to apportion the punishment to the degree of *moral* guilt involved in the particular offence. The special business of law is the protection of life, person, and property against violence as well as against depredation. It is even more necessary to repress by punishment crimes of violence because they are more noxious to the community by the terror and distrust they occasion, by their dangerous tendency to incite irregularly constructed minds to imitation and the dissolution of society itself that would result from any extensive following of the example. Hence the jealousy with which the sacredness of human life is regarded by all civilised peoples and the severity of punishment that everywhere attaches to disregard of it. Protests are often made by philanthropists against the punishment of death; but no lesser penalty has been found sufficiently deterrent to prevent that highest crime, *murder*. The very exceptional nature of the punish-

Capital punishment.

ment applied to an exceptional crime is calculated to impress the mind with a horror of it. Not the least of its recommendations is its appropriate character—the crime in the doing of it suggesting the punishment. It is the best, indeed almost the only, form of the natural *lex talionis* that civilised society has been enabled to preserve. If it were practicable, that would indeed be the best, because the most suggestive, shape of all punishment. It is remarkable that capital punishment was much more vehemently opposed some years ago than it is now. Discussion has served to diminish the number of objectors and experience has not confirmed their views. There was wisdom as well as wit in the *mot* of Talleyrand, addressed to a philanthropist who had urged upon him the argument so often advanced that "we should respect the sacredness of human life." "Then," said he, "let Messieurs the Assassins begin and set the example."

But the verdict as well as the punishment of *murder* should, for the purpose of preserving this distinction, be strictly reserved for the cases of *real* murder — deliberate murder — murder "of malice aforethought," as our law words it,—and thus coincide precisely with the opinion of the community, whose sanction the criminal law should always carry with it and wanting which it loses half its efficacy.

Murder. Where the jury, so expressing their intent, find a verdict of *wilful murder*, the Judge has no option but to pronounce the sentence imposed by the law. Any mitigation of it must come from the Crown.

Manslaughter. But where the verdict is of *manslaughter* a vast range of choice presents itself to the Judge. As the crime itself extends from one degree next below murder to one degree above "justifiable homicide" or "homicide by misadventure," so the punishment ranges

from penal servitude for life to imprisonment for a day. The penalty in each case must be determined by its special circumstances. But some rules may doubtless be devised to assist the Judge in the discharge of this difficult duty. Although he has arbitrary power over the punishment, it should not be determined arbitrarily. The sentence should be measured with reference to some principle of punishment.

Measure of punishment.

The first consideration is the nature of the crime, taking into account all the circumstances under which it was committed: (1) Was there provocation, and to what extent? (2) Was there anything like deliberation? (3) Was there aught that would excuse, not the violence itself, of course, but the *passion* that led to it? (4) Was the passion raging in its first fury at the moment of the deed, or had it time to cool? (5) How was the blow delivered, with a weapon or with the fist? (6) If with a weapon, how did it come into the hands of the assailant? (7) Did he exhibit sorrow for the consequences of his passion? Was he willing to make all the reparation in his power? These are ingredients to be considered in determining the sentence for manslaughter. As are the answers to them, so is the crime aggravated or mitigated and so should be the punishment.

And the punishment so publicly awarded must have reference also to the danger of the crime to others as well as to the moral degradation which it indicates in the criminal. The lesson to be taught to others by his example is the risk of indulging a passionate temper, or rather of not sufficiently labouring to keep it under restraint. The exemplary effect of the punishment depends upon the degree in which it is likely to present itself to a passionate mind as a possible

consequence of giving the rein to passion. Therefore, to be effective, the fear of the penalty must be stronger than the passion it is designed to curb. This is the rationale of the severity which in most civilised countries marks the punishment of homicide in the second degree, as in the instances of stabbing or shooting in a quarrel.

Mitigating circumstances.

But there is a crime of homicide next in degree which demands special consideration in the meting out of the penalty. The convict intended *some* violence, but *not* the consequences of the act he has done. The *law* necessarily holds to the principle that a man is responsible for the consequences of his acts and if he does an act in itself unlawful he must bear all the consequences resulting from that act. Intending merely a slight blow, he hits a dangerous spot, striking so that no harm would have come of it under ordinary circumstances; but by reason of the bad condition of the body of the deceased the small wound mortifies and kills or, if disease was already existing, the blow hastened death. In these and many like cases *the law* recognises no mitigation. But the Judge may and ought to do what the letter of the law cannot do and regulate the punishment rather by the degree of *moral* than of *legal* guilt—moral guilt being mainly a question of *intention*.

Homicide by carelessness.

So it is with homicide caused by carelessness. Perhaps there is less to excuse this than homicide the result of passion, for a man cannot always control passion but he can always avoid reckless carelessness. In such cases the duty of the Judge is to apportion the punishment by measuring the carelessness that caused the crime.

Turning now to crimes of violence not resulting in death, it will be seen that these also exhibit a very

wide scale of guiltiness and demand much consideration in the apportionment of punishment to them. Let us take them in the order of their actual criminality:

1. Violence used in the commission of some other crime, as robbery by violence. Robbery by violence.

In all such cases *two* crimes are committed—the crime of assault and the crime of theft. The punishment, therefore, should be compounded of the penalty incurred by each crime, with the addition of a *third* element, namely, the sense of terror and insecurity which offences of this class spread through the community. The measure of punishment for the violence should also be apportioned to the character and amount of that violence the locality in which it was employed, and the person on whom it was inflicted, as also if aught in the shape of cruelty or injury had been inflicted to a greater extent than was necessary for the execution of the purpose. All these are *aggravations* that should go to swell the amount of punishment.

This is the principle which justified the excellent and most efficient enactment that added to the previous punishment for robbery the special punishment of flogging where violence had been used. Pain wickedly inflicted was properly punished with pain deliberately inflicted on the brutes whose nature is sensible to no other influence. It teaches them, and such as they, that as they sow so will they reap. They soon understand the *lex talionis;* and it *is* understood by the class it was designed to terrify, as is proved by the great diminution of that form of crime. Flogging.

2. Rape is a crime of *passion.* But it is not an uncontrollable passion, like suddenly kindled wrath. The wrong done to the victim is enormous. The Rape.

social terror it produces is great. There is always time for conscience to speak—always a full consciousness of the crime, and always it is as cowardly as it is cruel. *When satisfactorily proved*, the highest secondary punishment should be awarded to it.

Cautions.

The real difficulty in charges of rape arises from the peculiar nature of the evidence by which it is usually sustained. It occurs but rarely that the actual offence can be proved by any other witness than the injured woman. Experience has taught all who are familiar with criminal courts how very unsatisfactory this evidence often is and how little reliance can be placed upon it. Having on one occasion successfully defended a man charged with rape before the late Baron PLATT at Exeter, on the conclusion of the case he said to me privately, "I have prosecuted, defended and tried more of these cases than any man living and the conclusion of my experience is that I do not believe in rapes."

Since that time I have had much of the like experience and it completely confirms that of the learned Baron. He did not intend, nor do I, to say that a rape is *never* committed. It may be, as in some instances it *has* been, with the aid of two or more, or when the victim has been rendered incapable of resistance by drugs, drink, or violence. But these are rare and exceptional cases. The vast majority of rapes charged are stated to be by one man upon a woman in possession of her senses and with only the possible benumbing effect of terror to deprive the victim of the use of her natural defences. In such circumstances there might be an *attempt* at rape; but actual rape is so nearly impossible that it should be accepted only on the most conclusive evidence.

Assaults with intent, &c.

In the absence of such positive proof, justice demands

that the *attempt* only should be found; and this finding raises an entirely new series of questions for the consideration of the Judge.

He must first be satisfied that there was a real *intention* to commit a *rape;* that is to say, that the defendant designed to accomplish his purpose wholly against the will of the woman and in spite of any objection or resistance she might make. He must be considered to have *contemplated* rape and to have intended to have committed rape, if not prevented by some accident. Unless this be clearly proved, it may be an indecent assault, but it is not assault "*with intent*;" and, as that crime is very different in its character, so does the law treat it, and so should be the punishment. The considerations that so much affect the question whether a rape was intended are so important that some of them may be well noticed here.

Was rape intended?

All who have had experience in the trial of these cases are aware how unreliable often is the evidence of the woman, while the man is wholly at her mercy. In the first place, she has the most powerful of all motives that can influence the female mind — the protection of her own character. With this object in view, it is often found that no amount of positive invention or false colouring appears to her to be unjustifiable. On this subject the truth is impossible to be obtained from her. They who are truthful in all other matters are untruthful in this, and the falsehood is usually uttered with an unfaltering audacity peculiar to this form of fibbing. Many a charge of attempted rape or of indecent assault has been brought because the woman has, or thinks that she has, been seen to permit, or is suspected of having permitted, familiarities that compromise her

reputation. Liberties are often allowed with no intent to encourage license, but forgetting that the man cannot always discern the precise point at which the one ends and the other begins and virtue resolves to vindicate itself. In these affairs "No" does not always mean "No." There is a resistance which implies assent. But also there is an expression of dissent which no man can mistake. The difficulty a Jury feels in trying these cases and the Judge in awarding punishment is to determine what was in very truth the character of the alleged assault—if it was *really* wholly against the will of the woman, or if she at all, and to what extent, contributed to it by inconsiderate encouragement at the beginning. It is not permissible to a virtuous woman to say, "thus far shall thou go but no further." If she chooses to excite fierce passions by permitting liberties to a certain extent, though herself intending not to advance beyond them, she has no right to ask the law to punish an offence which she had prompted. In such cases, although the Judge must tell the Jury that, inasmuch as the law assumes every man to have perfect control over his passions, he is responsible for his misconduct, however caused, and they must find him guilty of the fact. But if such provocation be proved, the Judge may and ought to take that circumstances into account in mitigating the punishment.

Indecent assaults.

3. Very nearly the same remarks apply to cases of *Indecent assault*. These vary in degree of guilt from a very grave outrage to a mere frolic. The law has even been laid down by a distinguished Judge in a celebrated case that to kiss a woman without her will, with an indecent intent or feeling, is an indecent assault. The doctrine is somewhat alarming, considering that a kiss is commonly stolen, with at least

the professed objection of the woman, and that there is not a man in the British Isles—who *is* a man—who has not been amenable a hundred times to the law if it be thus rightly expounded. But it is not necessary to carry the criminal law to that extent. If the question were to be raised before the Court of Appeal. there can be little doubt that it would be held that to constitute an indecent assault there must be an indecent *act* as well as an indecent *intent*. In practice, however, such a question need not trouble the Judge in determining his sentence. He will be guided by the general history of the case, asking himself if it was or was not an *outrage*—that is to say, an act of indecent insult to the woman, without provocation or excuse of any kind. If this appears, severe punishment is due to it. Imprisonment should follow, measured by the nature and extent of the outrage, and the time, the place, and the manner of its commission; looking upon it also in relation to the general welfare and the security of the subject in the performance of the ordinary duties of life. An outrage of this nature in a highway, in a street, in any place that females must frequent, is a far greater offence that in a house where the parties are living together. So if the offender is a stranger, it is worse than if he merely presumed upon acquaintance. The object of punishment in such case is the protection of the public by example and the punishment should be exemplary.

Assaults on children.

But there is one form of the crime that calls for special note. It is the too frequent one of indecent assaults upon young children. Formerly the defendant escaped often by contending that what was done was not shown to have been done against the will of the child (that being deemed needful to the

definition of assault), even though the child did not know the meaning of the act. The law is now distinctly declared on this point. Upon a case reserved by myself from Middlesex Sessions, the Court of Criminal Appeal held that if the child was too young to know the meaning of the act done, so as to give a positive *assent* to it, the law would not presume assent from mere submission, but that it was an assault nevertheless. The difficulty in all such offences is their necessary secrecy and therefore the dependence of the jury upon the evidence of one witness only. But the safeguard against injustice from children is the improbability of their being clever enough to invent such a story or having such knowledge of such acts as would enable them to do so. The details of the story told by the witness and her manner of telling it are the points to be observed most carefully. If the prisoner is convicted and the Judge is satisfied that the story is substantially true, he has a simple duty to perform. For such an outrage there can be no excuse, no one feature of mitigation. The injury inflicted is incalculable, and the sentence should express the sense which all must have of the gravity of the crime.

In this crime, as in all others, there are, of course, degrees of guilt. The assault may be in the worst form and should then receive the highest degree of punishment. There are lesser degrees of it which, as implying less abandonment on the part of the man and less injury to the unfortunate child, might properly call for a mitigation of the punishment.

Wounding.

5. We come now to the offence of *wounding*, maliciously or otherwise, or inflicting actual bodily harm. This again has an extensive range of criminality. Every case must be carefully judged by its own pecu-

liar circumstances. Where malice—meaning by this term *actual malice*, and not the mere legal presumption of it—is apparent, the punishment should be of the highest, for the crime would have been murder had it been completed. When a blow is delivered with a dangerous weapon, it is but a chance whether it will kill or only wound, and the guilt is not lessened by the good fortune that saved the victim from death. It is upon the question of *malice* alone that the measure of the penalty can be determined.

But if the malice is not distinctly proved—that is to say, if it be not clearly shown that the wound was inflicted with *design* to do such an injury as such a weapon as that used could or might do if so used—the question of motive will demand the most careful consideration in adjudging the sentence. What was the immediate motive? Passion. How was that passion excited? By any and by what amount of provocation? In what manner was the act done? With what deliberation or with what weapon? Was the weapon purposely in the hand at the moment—as the knife when at a meal—or was it accidentally lying near, almost inviting use? Are there grounds for mitigation on the plea of momentary passion? Or was there an interval for better thoughts to arise? Was the weapon sought for? Was the knife taken from the pocket and opened? Was the blow accompanied with exclamations indicative of malice or revenge? Was sorrow shown afterwards? If these or any of these conditions are apparent, the crime is greatly aggravated or lessened and to that extent the punishment should be increased or mitigated.

If with cruelty.

If the crime was marked by *cruelty*, whether with or without the accompaniment of passion, a yet more severe treatment of it is called for. A blow with the

fist is often to be excused; there are cases in which the use of a weapon,—though never excusable save in actual self-defence—may be treated with the utmost leniency as having been the result of thoughtlessness rather than of wickedness. But there can be no excuse for cruelty or brutality. The arm may often be excused, the foot never. In no case is kicking to be forgiven. It is at once cowardly, cruel and brutal. Whensoever resorted to it should be visited with exemplary punishment. It is one of the few cases to which the penalty of flogging might be advantageously extended.

Assaults on policemen.

6. *Assaults on Officers of Police* and other officials acting in the execution of their duty are properly made specially punishable by the law. But these offences also vary much in degree of criminality. In all cases of the class it is to be remembered that in this country the police have only the law to protect them. In other countries they are, for the most part, an armed soldiery, and formidable resistance to them by anything less than civil war is practically impossible. In England, the police are sent alone and unarmed into the most dangerous districts of the Metropolis and the great towns and into the most lonesome places in the country, having only a staff wherewith to defend themselves against the attacks of criminals who have grudges against them and the assaults of the foes of peace and order, the rude, the passionate and the drunken. It is their difficult and dangerous duty to protect life and property against lawless invaders and to preserve public order among the unruly. Often they are called upon to contend alone against many and in the *melée* are exposed to kicks and blows from savages who "pay off old scores," as they say, in the supposed safety of a crowd or under

cover of darkness. If the police use force to resist force they are abused by a sensation-seeking press, by popularity-hunting orators in and out of Parliament and by silly sentimentalists. If they do not clear the way but leave "the roughs" in possession of the pavement, they are equally abused by the same lips and pens for not keeping order. Unhappily this injustice bears practical fruit. When a charge is made of assault upon a policeman, even if it be preferred against a brutal ruffian who has set the law at defiance and half killed his victim while performing the duty of arrest, the same stereotyped form of appeal is made by Counsel to the gallery, if not to some hoped-for prejudices of the jury. The policeman, who alone has been injured, is always depicted as the ruffian who calls upon quiet people to move on, who pours a torrent of abuse upon unresisting and unanswering promenaders, who wantonly wields his staff and cruelly beats and illtreats harmless people going soberly and steadily and silently through the streets. Nor is this manner of address always without effect upon the jury, already prejudiced against the police by the habitual abuse of some of the newspapers. Great difficulty is often found in procuring a conviction even in the clearest cases. Juries who so act have obviously forgotten, if indeed they had ever thought of, the consequences of thus depriving the police of the protection of the law. They have not reflected that their own persons and properties are committed to the care of these very men; that if the police were to be terrified from the resolute performance of their duty by the superior numbers and force of the sworn foes of order, neither themselves nor their fortunes would be safe for twenty-four hours; that as the police have nothing but the law to protect

them against outrages easily to be committed upon them in the localities where they are at once most required and most in danger, rascaldom would speedily obtain the mastery and the metropolis and the great towns would be sacked by an enemy more terrible than a foreign foe. It is the duty of the Judge, having heard one of these to him familiar defences, clearly to point out to the Jury the fallacy of such an argument, its dangerous tendencies, and the claims of the injured policemen to protection when an outrage upon them has been clearly proved.

Punishment.

The sentence should be measured by all the circumstances of the case—the time, the place, the occasion, the number of persons engaged in the assault, the provocation, the amount of injury actually done, how it was done, if by a weapon, if with kicks, where the blows were aimed,—for it is doubtless familiar to the reader that the roughs know how most readily to disable an antagonist and do so without caring for the consequences.

Rescue.

A great *aggravation* of this form of assault is its employment by others for the purpose of *rescuing* a prisoner from actual custody. As representing the highest degree of lawlessness, this offence demands almost the highest degree of punishment. Extenuating circumstances can be but few. But the offence is capable of almost indefinite aggravation according to the amount of violence actually employed.

Common assaults.

There are lesser cases of *assault,* growing out of quarrels, small provocations, accidental excitements, of frequent occurrence in Magistrates' courts, and occasionally at the Quarter Sessions, that require different treatment from those more aggravated forms of assault already considered. For the most part these partake rather of the character of civil wrongs than of crime

and justice may be often done by treating them as such, recommending a settlement by mutual shaking of hands, or, if there has been any real injury, by reasonable compensation. It is most undesirable to permit these cases to be fought out by the parties, if the intervention of Judge or Magistrate can bring about an amicable settlement, as for the most part it does. Charges of assault or abuse are the most troublesome of all questions to try, because of the almost impossibility of ascertaining the very truth. The complainant invariably swears that he (or she) never used an angry or insulting word, never struck or returned a blow, was attacked without the slightest provocation and without a conceivable motive, did not lift up fist or voice, and was simply a passive victim to cruel violence. The defendant cannot be heard in his own defence; but if he has partisans who can give evidence for him, they reverse the whole story, and according to them the insult was offered, the first blow struck, by the prosecutor,—the violence was all on his part, the prisoner was the most peaceable person present. If independent witnesses are called, they are sure to differ much in their narratives. The truth is, that in a fight each pair of eyes sees only some part of the whole, and that imperfectly, and a conclusion can only be arrived at by the Jury or Magistrate coming to an independent judgment of the case from the probabilities rather than from the evidence. Hence inquiry should be made into the history of the origin of the quarrel. From this, a fair opinion may be formed on which side lay the probability of *provocation.*

Settlement of common assaults out of Court.

If the parties cannot agree to a settlement of out court—if it is a case rather for compensation than for punishment—a matter more of civil wrong than of

criminal offence—it is often desirable to defer the sentence to the next Sessions, allowing the defendant to go out on bail, with an intimation that an amicable settlement must be made before that time or the law will take its course.

CHAPTER XII.

VI. CRIMES OF VIOLENCE.

The foremost object of all legislation is security for *the person*. The security of property is second in importance to this; hence the exceptional severity with which crimes of violence are punished in all civilised countries.

Under this title reference is made more particularly to crimes where the violence is *deliberate*. Although crimes caused by passion are always attended with more or less of violence, it is necessary to distinguish them for the purpose of punishing the *criminal*. Hence the division *here* into two chapters of that which, in a treatise on *crimes*, should come into one category. Deliberate violence.

All crimes where violence is either deliberate (or, as the law expresses it, of malice aforethought) or where the bodily harm is inflicted in course of commission of some other crime, require to be treated as being of the utmost gravity. *Primâ facie* they call for *exemplary* punishment, especially where the violence has been superadded to another crime. But, as with all other offences, the degrees of criminality in crimes apparently of the same magnitude may be very various, demanding a like variation in the methods of dealing with them. Let us take them in their order.

Murder is the greatest crime, as practically involving Murder.

many crimes. Not only does it take from a man that which he most regards—his life—but the sense of insecurity caused by the commission of that crime produces more pain and panic in the whole community than any other. Every person feels that he is subject to the same danger and that if the sacredness in which life is held were once diminished murder would become rife. The punishment of death is now properly reserved for this crime alone and it is not likely to be abandoned. A great effort was made some years ago to procure its abolition; but discussion and experience where it has been tried have satisfied most of those who once advocated its abolition that capital punishment could not be abandoned with safety.

Robbery with violence.

The next in degree are cases in which violence is used in the commission of another crime, as in highway robbery, burglary and such like. Although the violence is not often premeditated in such cases, it is so probable an attendant upon the crime to which it is superadded that the perpetrators of the principal crime must contemplate the possibility of resort to it and therefore it should be treated as a crime of *deliberation*. In meting out punishment, the Judge should look upon the offence as what in fact it is—a crime composed of two crimes, and the sentence should be compounded of two penalties; "without the violence, I should have sentenced him to so much for the robbery; the violence adds so much more to that crime; the criminality of that violence is enhanced by its having been employed in the commission of a crime." This should be the course of reasoning in the mind of the Judge. Robbery with violence is

Flogging.

now punishable with flogging—a very wholesome provision, which has produced most beneficial results in the diminution of the form of crime against which

it was especially levelled. But that punishment should be reserved for cases of serious violence, having the character which may be best described as "brutal." Ordinary violence may be better punished in the ordinary manner, by penal servitude or imprisonment, as the case may be.

Street robberies with violence.

Street robberies with actual violence, that is to say where injury is done to the person robbed, call for stern repression, because the law is almost the only protection of the subject against the lawless. All persons must walk through the streets, at all hours of the day and night, alone and unprotected and sometimes of necessity carrying property of value. No vigilance of the policeman can guard every lonely spot upon his beat. He cannot be everywhere. In fact, the robbers set one of their gang to watch him and only when he is out of sight do they attack their victim. The *law* does not, and indeed cannot, define *degrees* of violence. It can but include all robbery with violence in one category and impose a punishment with so wide a range that the Judge who tries may apply the proper sentence to the precise degree of the offence. This the Judge will measure by consideration of the time, the place, the number engaged in the commission of the crime, and especially by the degree and kind of violence employed. But while the worst cases will demand the highest measure of punishment, no case of violence accompanying robbery, whether in the highway or in a dwelling-house, can be treated lightly. It is difficult to imagine any extenuating circumstances that could justify a light sentence in such a case, for it can never come within the class of "occasional crime" considered in a former chapter. The question can only be as to the degree of *severity* with which it should be treated.

Assaults with intent to injure.

Next in order of magnitude come assaults committed *with design to injure*—not under the influence of sudden passion but deliberately planned and which the law intends by *maliciously wounding*. This charge is always included in indictments for wounding and properly the law affixes to it a very much heavier punishment than where the offence is wanting in the element of malice. The reader needs not to be reminded that the legal definition of *malice* is not precisely in accord with the rational definition of it. The law relating to wounding, &c., is not designed to punish for cases raising such nice distinctions as appear in questions of murder—as, if there was a momentary interval for reflection and repentance and such like. It means, or juries always sensibly construe it to mean, a wounding with the intention which everybody understands by the term *malicious*—a deliberate design to do the injury and doing it in pursuance of that design. In trials for wounding, where the first count is for malicious wounding, it is desirable to direct the attention of the Jury to this distinction; and, as the count for actual bodily harm sufficiently meets the cases where there is a doubt as to the presence of actual malice, he should recommend them, if they are not satisfied that there was express malice, to confine their attention to the count charging the lesser offence.

Use of a dangerous weapon.

Here, also, a very wide range of punishment demands the discretion and most careful consideration of the Judge. Was the crime inflicted with a dangerous weapon? If so, how came it into the hands of the defendant? Had he been using it for some lawful purpose? Was it in his hand at the moment of the assault? Or was it snatched up as it lay near? Or was it taken from some other place of deposit? Was the possession of it prompted by

any supposed requirement for defence, or was it purely aggressive? These questions will present themselves in all charges of wounding, and they should be well considered, for the purpose of resolving whether and to what extent there was deliberation in the use of the weapon. The nature of the weapon is of much moment in measuring punishment. The more dangerous the instrument the more care is a man bound to exercise in the handling of it. A defendant might not improbably be holding a knife at the moment of an affray, but it is highly improbable that he should be holding a dagger.

Nature of the injury.

The character of the wound is not so important an ingredient in guilt as at first appears, save as affording some indication of the amount of force used and of the animus with which the blow was directed. In ordinary assaults the blow is rarely aimed at any particular part of the person. When a stab, for instance, is given, accident usually determines where it shall alight and what obstacles may arrest its progress. Hence, on the one side, the crime is not diminished because accidentally no great injury has been done by that which might equally have caused death; on the other side, the extent of the wound is no proof that injury to that extent was designed. The only inference to be drawn from the character of the wound is in the prisoner's favour to this extent only, that from a small injury intentionally done, where a great injury might as readily have been done, it may be inferred that the lesser and not the greater injury was intended, and this to a certain extent might be taken in mitigation. But caution must be exercised, in accepting such an argument, that it does not violate the wholesome rule that a man must be presumed to intend the probable consequences of his acts, and therefore, that if he uses a dangerous instru-

ment in a dangerous manner he is morally as well as legally responsible for the results, although he had not designed them to their actual extent.

Provocation.

How far is *provocation* to be considered in punishment? It is not admissible as an answer *in law* to any charge of assault, nor can it be accepted either in reason or in law as a justification for the use of a weapon. The only shape in which this plea can be received in mitigation of punishment is where the weapon used was accidentally in the hand at the moment of provocation or so near as to be irresistibly tempting. This plea is often urged upon the Jury by Counsel defending in cases of wounding and sometimes with effect. But the Judge can give no sanction to it. He must tell the jury distinctly what the law is in this respect, and advise them that, if they are satisfied of the fact of the wounding, the provocation is not to be considered by them save as a recommendation to mercy. But the Judge may and should take such circumstance into consideration, making some allowance for the frailty of humanity and the passions that have been naturally roused by the misconduct of the injured party.

Use of the knife.

But the use of a knife, or indeed of any weapon in any quarrel, requires to be sternly repressed. Under *any* circumstances it is not to be treated lightly. It has been always hitherto an un-English crime. I am sorry to say that it appears to be now a growing one. When first I practised in Criminal Courts it was a crime much more severely treated than now it is. The late Mr. Justice Coleridge invariably punished it with what was then transportation and that was the general practice. Now it is never so punished save under circumstances of extraordinary aggravation. Perhaps the Courts may have gone too

far in the direction of leniency, and it may be necessary to retrace their steps to some extent should the offence continue to grow.

There is one form of this crime that has caused a great deal of public interest and set in motion many pens of journalists looking for subjects to write about and sighing for a sensation. I refer to that which is called by the generic name of "*wife beating.*" According to the newspapers, no offence could be so easy to deal with as this. The Magistrate should send every case to a jury; the Judge should always inflict the extreme penalty and, as if sufficient power of punishment was not at present vested in the Judge, the Legislature has been urged to add to his powers the punishment of *flogging*. Wife beating.

It will be in the memory of the reader that I have no sentimental objection to flogging. In a former chapter I have shown it to be an appropriate punishment for certain offences implying brutal cruelty. But it will be observed that those offences are of an unquestionable character. They admit of no excuse nor palliation. If brought home to the prisoner as the perpetrator of them, there can be question as to the degree of his guilt. A garotter who half kills his victim for the purpose of robbing him can plead no extenuating circumstances whatever, and whatever the punishment attached by the law to garotting, no person can object that the ruffian has not richly deserved it.

Otherwise it is with the offence of "Wife-beating." It varies infinitely in decree of criminality. It may be as bad or even worse than garotting and deserve a like punishment. But also it may be so trifling as almost to permit of a justification. This it is that makes the proposition to extend flogging to this Flogging for wife beating.

offence so problematical in the judgment of most of those who have had practical experience in Criminal Courts. There are some cases in which it would be an appropriate punishment and where its infliction would be approved by all who do not object to flogging in any case. But such cases are only a fraction of the total of "wife beatings." It would be impossible to extend the punishment to all such cases and equally impossible to define by law the boundary between them. The only practicable course would be to throw upon the Judge the formidable duty of determining if it was or was not a case for the exceptional punishment; and this would depend on so many considerations that I, for one, should be most reluctant to have such a responsibility thrown upon myself and I should be equally loath to have it assigned to others. Opinions on this question vary so widely and so many of them are based on purely sentimental impressions rather than on a calm judgment and positive knowledge, whether in favour of or against the punishment, that we should certainly witness a most considerable difference of practice in different Courts and between different Judges. The change was proposed in a panic. The exhaustive inquiry made by Mr. Cross from those who were most competent to form an opinion revealed so many doubts as to its propriety that probably the question will not be raised again. I ventured to suggest that, if adopted, the power should be limited to the Judges of Assize and I trust it will never be extended beyond them.

Objections.

This suggestion was the result of a very large experience—greater probably than that of any contemporary—inasmuch as it has fallen to my lot to try more indictments for assault than any living Judge.

Among them were, of course, a very large number of "wife-beating" cases. Nevertheless, I cannot recall half-a-dozen in which I would have inflicted the punishment of flogging had I possessed the power. In this, as in many other matters that excite the sentimental section of the public and make material for gushing leading articles, it is much easier to preach than to practise. The fact is rarely found to resemble the fiction. The pen and ink picture of the loving wife and submissive slave brutally beaten by her brutal husband, without provocation or resistance, as if for mere pleasure of indulgence in cruelty—the stronger tyrannising over the weaker—the master torturing his slave—the man using his greater strength to crush the weak, helpless, and unoffending woman whom he has sworn to protect and cherish,—is very rarely found in the dramas of actual life as exhibited in the Criminal Courts. I can, indeed, remember but five of such cases in all my extended experience. When the facts come to be sifted in the witness box—that extinguisher of fancies and sentimentalities—they usually prove to be altogether different from the ideal picture. In the vast majority of these cases the suffering angel of the sensation "leader" is found to be rather an angel of the fallen class, who has made her husband's home an earthly hell, who spends his earnings in drink, pawns his furniture, starves her children, provides for him no meals, lashes him with her tongue when sober and with her fists when drunk, and if he tries to restrain her fits of passion, resists with a fierceness and strength for which he is no match. He is labouring all day to feed and clothe her and his children and when he returns home at night this is his greeting. The law gives him no redress, no help. He cannot send her away—he cannot obtain

Results of practical experience.

a divorce. He is tortured and taunted to the verge of madness. He drinks to drown care. In his cups he vows vengeance, and excited by liquor he assumes unwonted courage, he commands obedience, he threatens punishment, she resists, there is a struggle, he to maintain his authority, she defying it; he for once has the best of it and the passion broken loose from restraint indulges itself without measure. With more or less of such accessories, this is the history of by far the greater number of the cases that come for trial, and, although there has been an excess of violence—although the punishment may have been brutal and even cruel and such as the law most properly is invoked to punish, it is very far indeed from having the fiendish character attributed to it by those who are informed of one side of the question only, and whose imaginative sensibilities are shocked at the act, without troubling themselves to inquire into the provocations that led to it.

Circumstances of mitigation.

Where all or some of these incidents are found, they are undoubtedly circumstances of mitigation and should be considered in the sentence. Unprovoked brutality and cruelty to a helpless and submissive woman demands the highest degree of punishment, even penal servitude. There *are* such cases, though happily for the honour of manhood they are very rare, and when they are distinctly proved they are entitled to no mercy. But from that point there are extenuating circumstances which the Judge will carefully take into account, ranging downward almost to a justification, and in which the interests equally of justice and of the parties will be best served by simply putting the offender under articles of the peace, or—which is much to be preferred—recognisances to come up for judgment when called on.

Principle of punishment.

For these cases have special features distinguishing them from proceedings between strangers, which require them to be received by the Judge, (not by the Jury) with considerations other than those that govern his judgment in ordinary cases of assault. In these he is concerned only in securing, as far as punishment can do so, the future protection of the injured party and of the public. But where the case is between husband and wife the Judge must look beyond this to *their* future. The class to which these offenders commonly belong cannot hope for so much as the luxury of a judicial separation. After the punishment has been endured by the husband, they live again together in the same wretched home, with the passions of the past aggravated by the penalty that has been paid for them. After a husband has been placed upon the treadmill on the complaint of his wife, is it *possible* that *he* can again love *her*, or is *she* likely to honour and obey *him?* Bad has been made worse. Would reconciliation be possible with any of ourselves? What would our homes be after such an ordeal? We must remember that their feelings are like our own, only they express those feelings in a coarser and fiercer fashion.

Refusal of wife to give evidence.

Another curious and, let me say, not discreditable incident is often exhibited in these cases. When in the witness box, the wife refuses to convict her husband. She denies all that she had stated to the Magistrate while under the influence of her anger. If wounded, the wound was caused, not by any blow from him but she fell by accident against the knife; the black eye was caused by the bed post. What can be done in such a case? Her deposition tells quite another story. She was beaten, bruised, stabbed, without provocation, without resistance. She swore

to this positively then. She repents now and desires to save her husband from the punishment she has herself invoked and she scruples not to commit the most audacious perjury for this purpose. The case then breaks down for want of evidence.

This is only another instance of the practical difficulty found in dealing with this class of cases. While censuring the wife's disregard of truth, it is impossible not to approve the feeling that prompts it; and as the man is indebted to her for his escape, we can only hope that he may show his gratitude by revived love and kindness and so the purpose of the law may be to some extent attained.

Principle of punishment.

But how to deal with him in case of a conviction? How to reconcile punishment for the past with the fact of future cohabitation? This must have sorely perplexed all Judges and Magistrates. For my own part I have been unable to discover a satisfactory solution of the problem. But thus much I have advanced towards it. Wherever the circumstances so far admit of extenuation that an exemplary sentence is not called for, I have appealed to the good feelings of both husband and wife — telling the man that he had subjected himself to severe punishment, asking the woman if she would forgive him for the past—asking both if they would endeavour to live more happily together for the future—reminding them of the consequences of their quarrels—how, if he were sent to gaol, she and the children would pay the penalty as well as himself. This appeal has seldom failed to elicit *promises* of amendment, although how far fulfilled I have no means of knowing. The course then taken is to bind him in recognizances to come up for judgment when called upon, with an intimation that, if any further complaint of illtreatment be made, he would

be brought up on this conviction and then punished with the greater severity. I have been informed that often they have left the court together in apparent harmony. Of their future I know nothing but that no one of them has been brought up for judgment and therefore it may be presumed that the opportunity given for repentance and reconciliation had not been altogether thrown away.

Punishment of crimes of passion.

In measuring the punishment of *crimes* of *Passion* there is usually wanting that most important ingredient in the estimate of criminality—deliberate design and calculated chances. The sentence is also comparatively feeble in its effect upon the primary purpose of punishment — the deterring of others by example. It appears to teach the lesson that such and such consequences may result from non-restraint of passion. But it is doubtful if punishment has much influence in reform of those who are criminal through passion or in deterring others from the like crime. The temporary mastery of the passion over the reason, which is of the essence of this form of crime, would itself preclude reference to that reason which is necessary for the exercise of the restraining will. It almost excludes the element of design and therefore punishment can be little more than preventive.

Character of the injury not a measure of the moral guilt.

But the difficulty in this case, as in so many others that present themselves in considering the question of crime and punishment, arises from this, that the *crime* is not a measure of the *moral guilt.* For instance, a man in a sudden fit of passion strikes another with a knife that chanced to be in his hand at the moment of provocation. Fortunately he cuts where the wound is harmless. But if the knife had struck a little to the right or left it would have severed an artery and caused death. The motives and

the moral guilt are the same in either case. These are in no way affected by the accident. But the law makes a necessary distinction which those who administer it are bound to observe. A very different measure of punishment is in practice meted out accordingly as the wound was slight or serious. I must confess myself at a loss for a principle by which the measure of punishment is to be determined in such a case. The lesson to be taught is, that if a man gives reins to his passion he must take the possible consequences of his act. It is undoubtedly essential to the safety of society that passion should not be accepted as an excuse for injury done to another, and that this should be publicly notified by punishment measured to some extent by the amount of injury done. A practical method of reconciling public safety with justice to the criminal will be suggested in a subsequent chapter.

Where no serious wrong is done to another by a crime of passion, the fact of its having been unpremeditated may be fairly taken into consideration and the punishment modified accordingly.

Premeditation or malignity.

Where a crime of violence is premeditated, or was instigated by a pre-existing motive of vengeance, jealousy, hatred, or other malignity, it should be punished with a severity proportioned, so far as is possible, to the nature and extent of the evil passion that prompted it and with especial reference to the *time* for which the design appears to have been cherished. The moral turpitude of crime increases immensely with the period during which it has been hatching in the mind of the criminal, because so many more were the opportunities for repentance and self control. The punishment should mark this feature of his offence both to himself and to others.

Assaults on peace officers.

Crimes of violence committed against the law itself in the persons of those by whom it is administered or executed demand exemplary punishment, for they endanger the safety of the whole community. The particular wrong is to the individual injured, but the greater wrong is to the entire public, and although but one policeman's head may have been broken the security of all men's heads has been shaken by that act. Hence it is that assaults upon constables and peace officers in the execution of their duty are rightly held in all civilised countries to be offences of great magnitude, calling for condign punishment, in order to deter by example other lawless persons who may be inclined to offend in like manner, and thus to throw around the guardians of person and property the utmost protection the law can give them in the courageous performance of their difficult and dangerous duties. Punishment in such cases is to be measured by the amount of injury done to the individual, to which should be added *invariably* the punishment due for the injury done to the public by the attempt made to deter or prevent officers from the performance of their duty of protection. A third ingredient in criminality and in the measure of punishment for this offence is the defiance thus shown to the law. If these items in the estimate of the wrong were always taken into account in the measure of punishment and always specifically stated in the sentence, brutal assaults on policemen would be more severely treated by Judges and Magistrates than is now the practice and the good result would certainly be seen in a marked diminution of what is at present an increasing offence. It would be a just and wholesome reform to establish for the punishment of this crime a definite rule which all should recognise, leading to something like uniformity of

practice in the courts and proclaiming to offenders that they can no longer count it as a lottery what their punishment will be. Might not the practice be advantageously adopted of giving in such cases *double the amount* of the punishment that would have been awarded for a like assault upon a private person?

Lawlessness by "the roughs."

Crimes of violence committed through mere lawlessness, such as those by which *the roughs*, as they are termed, with growing audacity make many parts of the metropolis and some of great towns and populous districts almost impassable and uninhabitable by the decent and the peaceable, certainly require to be visited with more severity of punishment than they have yet received. There is no crime upon which example is likely to be more effective and none is so readily fostered by impunity. In crimes for gain the criminal stakes the chances of success against the chances of failure and punishment. But in crimes of mere lawlessness there is no hope of profit to be staked against the chance of pain; and even the brutal natures who indulge in this offence are conscious that they may be made to pay too dearly for their amusement.

Robbery by threat.

In this category of crime may be placed another form of robbery distinguished alike for its cowardice and its cruelty. I refer to the offences that may come under the general designation of "*Robbery by Threat*," in its many phases, as recorded in our criminal courts. This crime possesses every feature that can aggravate a wrong. It is deliberately planned; it is usually exercised upon the weak or the timid. From its nature it causes the greatest quantity of suffering to the victim and success is sure to provoke its repetition. It spreads the greatest amount of fear and sense of insecurity among the community generally. It is difficult to conceive of a mitigating circumstance

in the most frequent forms of this crime. Even if there be truth in the subject matter upon which the threat is based as the engine of extortion, it in no manner diminishes the crime and should not be considered in apportioning the punishment. But an important distinction is to be recognised by the Judge in regard to the nature of the threat itself. Some threats are comparatively harmless, others carry a terror with them to the stoutest hearts which too often prompts to imprudent submission as preferable to the publicity necessarily attendant upon resistance. It is a natural but a mistaken policy; for if such a grasp upon the victim be once given to the extortioner, his hold is never released and each successive yielding serves only to encourage further robbery. There are two distinct classes of threats, differing much in degree of criminality: (1) Threats employed for the purpose of annoyance and from motives of malice; and (2), Threats employed for the purpose of robbery by extortion.

Malicious threats.

Malicious threats, whose object it is to excite fear and alarm for the gratification of revenge, cannot, for the purpose of punishment, be estimated by the character of the threat itself so much as by the motive that prompted it. The *malignity* is the measure of the guilt of the criminal and, therefore, of the penalty to be imposed upon him. In all such cases the Judge should make very careful inquiry into the whole history of the affair before he determines the sentence. The antecedents of the prisoner; his relationship to the prosecutor; the provocation, if any, its nature and amount, are all to be taken into consideration as elements of the crime, as also the previous good or bad conduct of the convict. Accordingly as these are favourable or otherwise, the mitigation of the legal

punishment will be. There are cases in which it will suffice to accept recognizances to come up for judgment when called on, or sufficient sureties for future good behaviour. There are others that richly deserve the full penalty provided by the law.

Extortion by threat.

It is otherwise with the second class of threats—those designed for *extortion* and which are in fact only another and vastly more dangerous process of robbery. The worst of these forms of threat, and unhappily not the least frequent, is that of accusing of solicitation to an abominable crime, knowing that the dread even of accusation is sufficient to terrify strong-minded men into submission to be plundered rather than have their names tainted with the slightest breath of suspicion and knowing, too, how easily a blot is made upon a reputation and with how much difficulty erased. Threats of assassination are far below these in atrocity, for they excite less terror, are less likely to be successful and are less cruel and cowardly. Experience has proved that the very worst course the victim can pursue is submission. He should at once communicate with the police if the threat is conveyed indirectly, and if made directly in person he should, if he has sufficient strength, instantly seize the offender and place him in the hands of a constable. If strength or courage be wanting for such a course, it may be prudent to temporize, but the very earliest opportunity should be taken to make the fact known to the police and ask their aid in detection.

This is a crime happily not so frequent now as it was a few years ago, a change due, I believe, to the inflexible severity with which it has been punished by the Judges. It is a crime for which mercy cannot even be entreated, for it is wholly without excuse or

palliation. The full penalty of the law should be sternly inflicted upon every conviction.

Proof of this crime.

But the inevitable punishment should induce proportionate caution in securing satisfactory proof of the crime. The offence excites so strong and righteous an indignation that merely to be accused of the commission of it is calculated to prejudice the jury against the prisoner. This imposes upon the Judge the duty of special care in sifting the evidence. Where the charge rests, as often of necessity it does, upon the unsupported testimony of the prosecutor, it must not be forgotten that he has the strongest interest in presenting himself as an innocent and injured man, with the privilege of telling his own story while the prisoner's lips are sealed: Instances are not unknown in which the charge has been made by the true criminal as being the best means to save himself. Some inquiry into previous character, examination of time, place and circumstances, will often be found necessary to make assurance sure that conviction would be just. (*a*)

(*a*) A new form of this offence has been introduced with the railway: charges by women of indecent assault, with purpose to extort hush money. That it is by no means an imaginary danger many proved instances of successful resistance have shown. There is reason to suppose that it has been and still is employed to a much greater extent than commonly believed, success attending the attempt in nineteen out of twenty cases. On one short branch of a great railway a woman plied this abominable trade for many months before detection. She travelled up and down the line in the trains that carried the fewest passengers. She waited until the train was starting and then entered any carriage in which she found a gentleman alone. Her first endeavour was to get up a conversation and then make cleverly contrived overtures tempting to familiarity. The hand taken or kiss snatched, she assumed an air of indignant virtue and threatened a complaint unless compensation was made; and the endeavour rarely failed. There is an authentic incident of an eminent man who

Character not always to be relied on.

But character in such cases is not always to be relied upon. Some years ago I tried at Middlesex Sessions a charge of this nature against a young man who had thus threatened a gentleman in a urinal in Regent-street. He called a swarm of witnesses to prove that his character was of the best. The Rector of the Parish stated that he was a teacher at his Sunday School and attended the services regularly. He was proved to be a constant visitor of the sick at St. George's Hospital, reading to and praying with them. His history from childhood was told and upwards of twenty friends of the highest respectability attested to his regular habits by day and his high moral reputation. It seemed almost impossible that so abominable a crime could have been committed by such a man. Nevertheless, the fact was placed beyond doubt, for he was seized by his intended victim and arrested on the spot. After his conviction, I was informed by the police that he had been in the habit for many months of frequenting the urinals in that neighbourhood for the express purpose of extortion, and that although they knew his errand, they had never been able to detect him—so great was the dread

found himself alone in a first class carriage on another railway with a well dressed woman. He was busily engaged with some papers of business and paid no attention to her. As the train was nearing its destination, she seated herself opposite to him and said, "I want a five pound note." "What do you mean?" said the astonished passenger. "You have been taking liberties with me," and at once she proceeded to let her hair down and disorder her dress. "Now I give you in charge at the station." Seeing that this evidence would be very formidable. he preferred submission to a police court and paid her demand. When extortion of this nature in railways, which all are compelled to use, is charged and proved, the highest permissible punishment should always be inflicted.

felt by his victims of having such a charge preferred against them as he had threatened.

Summary.

The considerations that should direct the judgment in the class of "Crimes of Violence" may, therefore, be summarised thus:

(1.) The *character of the crime* (if any) in the pursuit or accomplishment of which it was that the act of violence was committed.

(2.) The *motive* for the violence; such, for instance, as malice, wanton cruelty, hope of escape, and so forth.

(3.) The nature and extent of the injury done to the person subjected to the act of violence.

(4.) The amount of alarm and fear the crime was likely to spread among the community.

As one or more of these elements of criminality are combined, so should be the measure of punishment.

CHAPTER XIII.

VII. CRIMES OF CRUELTY AND BRUTALITY.

These crimes are placed in a separate class because, although often involving violence, they possess a special criminality that demands special consideration in the punishment to be awarded to them.

The essence of these offences is an *intention to inflict pain*, too commonly from a horrible pleasure taken in its infliction, sometimes from motives of gain, sometimes of malice, and sometimes from mere brutal thoughtlessness.

Cruelty the usual result of fear.

Cruelty is in the vast majority of cases inflicted upon the weak and those who are in the power of the offender. Fear is so frequently the cause of cruelty that the cruelty of a coward has passed into a proverb. The most frightful acts of cruelty the world has witnessed, in all countries and at all times, have been committed under the impulse of *fear*. Religion has been unhappily credited with the largest and worst atrocities of cruelty. But religion was not their true motive, only the pretext. The authors of all the barbarities perpetrated in the name of religion were priests who, forbidden to fight openly with weapons, resorted to hideous cruelties for the purpose of terrifying the opponents they were not permitted to meet in a fair stand-up fight. Cruelty attends

upon panic like a shadow. Our own generation, with all its enlightenment, has not been free from it, as witness our own vengeance in the Indian mutiny and the more recent atrocities of Russia and Turkey. Doubtless we should all be cruel again if a serious alarm were to be felt for our lives and fortunes. But these are gregarious rather than individual offences. The cruelty against which the law is levelled is for the most part that inflicted by relatives upon children, by masters upon servants, by the sane upon the imbecile, and, more than all, by human brutes upon animals.

Illtreatment of wives by husbands has been considered in a former chapter and needs not to be repeated here. Cruelty and neglect of children by parents and step-parents is a frequent offence, always punished by the Judges with great severity. Masters and mistresses are equally responsible for maltreatment of their servants, especially if they be children or apprentices, and should be dealt with in like manner. So for maltreatment of the imbecile and insane. To the punishment that would be inflicted for the injury actually done to the victim something should be *added* for the indication which the crime itself affords of a vicious frame of mind. It is one of those offences indicating an evil disposition that demand some strongly deterring influence to restrain indulgence. And this is to be found in severity of punishment, when it is proved that a vicious disposition has been indulged.

Neglect of children.

To this category belongs the offence of *Cruelty to Animals*—a crime for the most part coming within the jurisdiction of Magistrates.

"Cruelty to Animals Act."

Much experience in these cases has taught me that they vary immensely in character and degree of

moral wrong. What the law intended to punish in this as in all other criminal or quasi-criminal offences is the guilty mind. The Judge must of course consider the nature of the act done and the amount of injury inflicted; but only to assist him in forming a judgment of the mental condition of the offender. It may well be that a greater injury done to one animal may be a lesser offence than a much slighter injury done to another animal. The *intent* is the test of criminality. Under the general charge of cruelty to animals all kinds and degrees of injury may be, and in practice are, brought into Magistrates' Courts and great caution is required to ascertain to what class each belongs. Many acts that savour of cruelty are committed in ignorance of the consequences; others are inconsiderately done. The really punishable offenders resolve themselves into two classes.

1. Deliberate and designed cruelty.

2. Cruelty through culpable indifference or negligence.

Both of these are grave offences, properly falling within the intention of the statute, but differing much in degree of moral guilt.

Deliberate cruelty.

1. Deliberate and designed cruelty, committed without excuse, with no motive but brutality, vindictiveness or passion, deserves the severest punishment. A pecuniary penalty is neither sufficient nor appropriate. Imprisonment should be rigidly awarded in all cases where such motive is sufficiently established. The nearer in such cases the punishment approaches to the original Divine Law of retaliation the more efficacious it will be for deterring from a repetition of the offence and the more striking will be the example to others. Infliction of needless pain upon another creature is best punished by infliction

of pain upon the offender. When he knows that he will suffer if he makes an animal suffer, the most brutal nature is restrained from indulging itself. The law has not extended the penalty of flogging to this crime; but the judicious Magistrate will subject the offender to the most unpleasant penalty permitted to him. If there be good reasons to suppose that the cruelty to the animal was prompted by malice towards the owner, the Magistrate should at once send the case for trial to the assizes, where an adequate punishment can be awarded. It is not necessary to impress upon Judges who try such cases the duty of visiting them with an exemplary sentence, for the crime is of exceptional magnitude and does not admit of mitigation of any kind.

Cruelty through negligence.

2. Cruelty through culpable indifference or negligence, although in degree of guiltiness far below the former class, is nevertheless a grave offence. All men are bound to use ordinary care and discretion in their dealings with other persons and the law has humanely extended this duty to the protection of animals whom man has taken into his own service. That righteous law is, indeed, based upon the assumption that those creatures are our humble servants and subject to our passions as well as to our control. It seeks to guard them, as well as our fellow-men, against advantage taken of their being perforce in our power, to protect them, so far as penalties may, against the abuses of that power. The same rule, therefore, is applicable to our dealings with them as with our fellow-men. We must not harm them through gross carelessness or negligence.

The Magistrate should first satisfy himself that it is not a case of deliberate and designed cruelty. This done, his next inquiry will be, Was it an act of care-

lessness or negligence? If "Aye," then the inquiry will be, whether such carelessness or negligence was culpable?

Penalty.

This is always a difficult question and a right judgment upon it can be formed only by a careful review of all the circumstances attending it. A pecuniary penalty will meet the requirements of such a case, regulated in amount by the degree of criminality thus found.

If ignorance of the consequence of the act done be satisfactorily shown, as in many cases is found, a nominal penalty will be the proper course by way of warning; for such a defence cannot be pleaded twice by the same offender.

Master and servant.

The most difficult duty of the Magistrate arises in the frequent cases where cruelty is charged against a servant for an act he has done in pursuance of his employment and for no advantage to himself, but under the general direction of his Master. For instance, the driver of a cart is charged for using a horse that has sores which the harness frets fearfully, or is too weak for work, or overladen, and such like, which are in the experience of every Magistrate. How may such a case be fairly dealt with?

The law makes no special provision for it. The man who drives such a horse is amenable to the law for the cruelty practised upon it. But that man is a servant merely. He has been directed to put the horse into the cart and he does so. He deems it, reasonably enough, to be his master's duty to determine if a horse is fit for use or not. The answer set up to this is that he ought not to obey his master's orders in the doing of an illegal act. This is true as an abstract maxim; but it is very difficult to observe in practice. As the world is, could a man who is dependent for his dinner upon his employer venture to say to him, "I *will*

not?" Yet is he the culprit on whom the legal penalty is to fall.

Penalties.

There is in this such manifest injustice that for many years I have adopted the practice, when in such a case the servant is summoned, to convict the servant, as we are bound to do, but to reserve judgment and direct the master to be summoned as a defendant and the servant to appear as a witness. If the servant proves that his master knew of the condition of the horse and yet ordered him to use it, I convict the master, and impose the proper penalty upon him and only a nominal penalty upon the servant. But in such cases justice is not always done, for the servant is naturally reluctant to tell the truth as against his master, and no positive proof can be had that the master knew of the condition of the horse; his orders were general, that the cart should do certain work. To impose a penalty upon the master in such case is to do a wrong to him. To punish the servant, who had merely obeyed general orders, would be an equal injustice to him. Here is an act of undoubted cruelty for which no fit punishment can be found. The servant has broken the law and must be convicted, for he was the person found doing the unlawful act. But a nominal penalty only can be imposed upon *him*, and an admonition to him, when next his master's horse has a sore on his back to refuse to harness it, but to take a holiday instead and sacrifice his wages and the food of his children.

Malicious injuries to animals.

But there is one form of cruelty to animals that comes within the province of the Assizes and Quarter Sessions and, therefore, belongs properly to this place. It is the very worst form of this crime—where the motive to the cruelty is malice against the owner of the injured animal. The criminal has a spite

against a man and wreaks his vengeance upon his horse, his cow, his dog, killing or maiming the unhappy beast to vex the man he has not the courage to attack in person. Such cases are not infrequent, and inasmuch as they combine the highly criminal ingredients of express malice and cruelty with a nature at once cowardly and brutal the punishment should be the severest the law permits. The only ground for mitigation should be the absence of one or more of these ingredients. But it is difficult to imagine any extenuating circumstance in such a case. In my own experience, having tried many of them, I do not remember to have found one. There have been degrees of aggravation of the cruelty, as shewn in the character of the injuries inflicted, the instruments by which they were inflicted, and the entire history of the offence; but no excuse can palliate the malicious motive.

CHAPTER XIV.

PREVALENT CRIMES.

SURPRISE will perhaps be expressed that Prevalent Crimes should be deemed a class of sufficient moment to deserve distinct treatment. But the experienced in the administration of the Criminal Law will readily recognise the importance of the subject and, therefore, I make no apology for devoting a chapter to it.

A fashion in crime.

There is a fashion in crime as in other social ways and habits. Not only have different classes of crimes their *seasons*, "coming in" and "going out" with the regularity of other fashions, but there is a direct tendency in crime to repeat itself. At one time house-breaking is the rage, at another garotting. Now there is a raid upon shops; now the taste is for stripping lead from buildings, and so forth. Again, criminals have a marked tendency to practise the same form of crime in despite of numerous convictions. Examination of the list of former convictions will show that in the great majority of instances they were for the same kind of crime as the present conviction, revealing what experience has proved, how trifling in practical effect is the deterrent operation of punishment upon the criminal. Crime has its various callings and degrees of dignity, like the honest pursuits of life. There are recognised grades among criminals. Some look down with contempt on others,

although standing in the same dock and punished in the same prison. The men who plot elaborate schemes of robbery or fraud on a large scale demand and receive the respect from their fellow thieves which superior intelligence commands everywhere. The burglar turns up his nose at the shop door thief and he in his turn despises the area sneak. Very few enter themselves for crime generally, but each appears to choose some one class of criminal calling and to make that his principal pursuit, although far more profitable courses may offer to him. One takes to pot stealing, another to shop-lifting, a third to pocket picking, a fourth to robbing lodgings, a fifth to house-breaking, a sixth to luggage-stealing at railways, and these offenders rarely venture upon a new walk of crime. As they begin so they continue. Many causes may be suggested for this curious tendency in the criminal class. Perhaps it is that success at the beginning induces fear of failure in new and strange enterprises. It may be that they have accomplished themselves in the one performance and like to do what they can do well. It may be the mere force of habit. Whatever the cause, the fact is patent.

Its causes.

But the tendency of crimes to be, as it were, in "the fashion," with consequent increase of them in a particular direction, is due to other causes. It is the obvious result of the imitative propensity. The newspapers report the trials and by none are these read more eagerly than by the criminal classes. The tact and skill exhibited by the prisoner in devising and accomplishing the crime in which he was so unlucky as to be caught,—his frequent former escapes, his ingenious defence, the cross-examination of the prosecutor and his witnesses, in which they are made to appear as the true criminals, the speech of

his counsel and the hesitation of the jury, are talked about and thought about and then the desire arises to do as he did, trusting to better fortune. Moreover, ordinary criminals have not much inventive capacity. They cannot conceive new forms of crime or devise new methods of committing it. They must do precisely as they hear that others do or as themselves have done before.

Imitativeness of crime.

The like propensity to imitation is shown in many ways. There is a fashion even in suicide. It is noticed that different modes of self-destruction are preferred at different times. Now it is by hanging, now by drowning, now by poison, and there is an obvious prevalent preference for particular kinds of poison. Recently, suicide by falling before a railway train has exercised an extraordinary fascination for disordered minds. It is a question if in such cases the suicide itself or merely the form of it is suggested by the newspapers. The conception of self-destruction may have been engendered by reading the report of other cases, or more probably the mind has already conceived the notion and is thus only directed to the manner of death. The same mental process appears to prompt a very considerable section of the criminal classes. On minds barren of ideas the sensational reports of crime carry with them a sense of pleasure by the mere stimulus it imparts to them. That which a well filled mind would read and forget to the empty mind becomes a haunting thought, and then follows an almost uncontrollable desire to realize the idea that haunted the mind. This is the psychology of suicide and of the greater part of the prevalent crimes.

Exemplary punishment of prevalent crime.

The remedy for a prevalent crime is *exemplary* punishment. In my long and large experience alike

in the Metropolis and in the Provinces, I have never known this to fail. When the calendar at Middlesex Sessions continued for some time to exhibit an excess of one form of crime, the late Assistant Judge consulted upon it and settled what the sentence should be so long as that offence was "in fashion." But the resolution was not acted upon without warning to the criminals. Upon the first conviction we remarked upon the growth of the offence and stated the determination to which we had come—that in the following Sessions, and thenceforth until the crime should be checked, a much heavier sentence would be sternly inflicted. But mere words proved to be of little value. Possibly they were not heard nor read by the persons to whom they were addressed; or they were regarded as an empty threat, not designed to be seriously acted upon. If the next Sessions produced the continued large crop of the particular offence, the resolve was inflexibly carried out, the reason for it being stated in every case. The punishment was known and understood by those to whose fears it was addressed, for there was an immediate and marked diminution in the crime so treated, and two or three sessions sufficed to restore the normal condition of the calendar and enable us to revert to the ordinary sentence for the crime in question. By degrees some other form of crime came into favour and was suppressed by the like process. Some years ago there was quite a mania for stealing metal from buildings. That was stopped by doubling the term of imprisonment. For a short time the much more dangerous practice came into fashion of cutting ropes from scaffoldings, which had the additional enormity of endangering the lives of the workmen. This was summarily extinguished by

Instances of prevalent crimes.

a sentence of eighteen months imprisonment and notice that, if repeated, a long term of penal servitude would inevitably follow. Then, for a season, pot stealing was in vogue. The thieves visited the public houses and pocketed the pewter pots—their use being, as the police informed me, as metal for coining. This was stopped in the same manner. At Portsmouth I have been required to treat a scarcely less formidable offence. Thefts had been deliberately committed by many soldiers in the garrison for the express purpose of procuring their discharge from the Army. They calculated that the ordinary imprisonment of three or four months for a petty larceny would be a cheap way of obtaining release from the service into which they had entered for the sake of the bounty. The labour of a gaol is not so irksome as drill; the food is almost as good. It was really an excellent bargain for them. Who can wonder that the hint thus given was speedily taken, and that thefts by soldiers multiplied with alarming rapidity. At first the magistrates dealt with them by summary conviction; but as soon as the true object was seen, they wisely resolved to send the offenders to the Sessions to be more adequately punished at the discretion of the Recorder. I had no hesitation as to the course to be adopted. The experience of exemplary punishment in Middlesex had satisfied me that the same remedy would be equally efficacious in Portsmouth. I was not ignorant of the objection which would be made to it. I knew it would be said that, under a conviction for one crime I was really punishing another and a different offence. I looked for Mr. Peter Taylor and a notice in Parliament. Some of the newspapers were loud in their complaints. But I had a growing mischief dangerous to the country to deal with and

Larceny by soldiers to procure discharge from service.

How punished.

I was resolved, come what might, to treat it according to the dictates of my own judgment and experience. I gave notice at the Sessions that I should treat all such cases for the future with exemplary punishment. But the grave question was how to measure that punishment. The conclusion I came to was that it must be such a term of imprisonment as would make the object to be gained by it—discharge from the army—a bad bargain. A soldier, who would not care for three or even four months of the restraints of a gaol for unrestricted freedom afterwards might not be willing to buy the boon at the price of confinement for a twelvemonth. I gave that sentence, stating my reasons. The result answered the expectation. There was an instant cessation of that form of crime. It has only revived very recently, when the memory of that principle of punishment had passed away. At recent Sessions I have been compelled to recur to it.

Results.

I was prepared to justify it, had the threat of bringing it under the notice of Parliament been carried out. As other Judges and Magistrates may be required to adopt the same remedy, they will, perhaps, excuse a brief statement of the grounds upon which I deem it to be not only expedient but *right*, and which I should have asked the Home Secrefary to state for me if the occasion had arisen. The argument is applicable to many other questions than that to which it immediately applies. I have already referred to this principle and its application, but I must briefly repeat them here.

Principle of such punishment.

The Law has affixed to a certain crime a certain penalty, but it properly invests the Judge with power to mitigate that penalty according to all the circumstances relating to the crime and the criminal, so as to adapt the punishment, as nearly as may be, to the degree

of criminality in the particular case and to any special conditions affecting the criminal. No law could anticipate the infinite varieties of facts that should affect the judgment in the meting out of punishment. The Judge must look both to the crime and the criminal in determining to what extent he should exercise his power of *mitigation*. An important ingredient in this inquiry is *the motive* to the commission of the crime. Some motives are vicious altogether. Some are so far the result of human weakness or the influence of unfortunate circumstances as to be almost venial. The punishments of these would properly be as far asunder as the opposite ends of the scale.

So in considering to what extent I would mitigate the two years of imprisonment which the law awards to the crime of larceny, I was entitled in this case of soldiers using larceny for another object to investigate the *motive* for the commission of the offence. It was clearly established that the object was to obtain by it release from a contract that for a consideration they had made with the country and in the performance of its part of which the country had been put to considerable cost. As I should have treated extreme temptation as a mitigating circumstance, so I was entitled to treat the motive to obtain a discharge by dishonesty as a circumstance of *aggravation* that justified me in a very slight mitigation of the penalty awarded by the law to the crime the convict had committed.

If in this I was right, the principle that determined the sentences is capable of much wider application and the recognition of it will often be found useful in the discharge of Magisterial duties especially.

It might be an answer by the Home Secretary to many of the complaints that come to him from what is called Justices' Justice. It is the answer the

Judges of Assize would, if they could, return to like complaints of unequal justice in apparently unequal sentences. The circumstances that mitigate in either case are not known to the complainants.

Robberies by carmen.

This efficiency of *exemplary* punishment in the suppression of prevalent crimes has been impressed upon me by many other experiences. A striking instance of it was exhibited in the series of robberies by carmen to the railways, who opened parcels of watches and jewellery in their vans, took out a part of their contents and resealed them. It was necessary to the protection of the public that such a system of robbery should be suppressed at once, if punishment could do it. That the sentence might be the more impressive, I reserved it until the trials of all were concluded and I never witnessed a more painful scene. The wives and friends of the convicts were present to hear the fate of their husbands and sons. I told them why a punishment of exceptional severity had been resolved upon. The crime was of exceptional gravity, alike in its nature, as a breach of trust, in the circumstances that had attended it, in the extent of the robbery, in the art with which it had been effected, in the number of persons engaged in it, in the corruption of the boys who were induced to assist, and that the sentences were of special severity purposely in the hope that others would take warning by the examples of their suffering and avoid their fate. It is my usual practice to avail myself of my power to mitigate and to treat a first conviction very leniently; but on this occasion I could find no one circumstance of mitigation. It was a duty to society to permit the full penalty of the law to be carried out and they were sentenced accordingly. I shall never forget the scene that followed.

It wrung my heart, but it did not disturb my confidence that I had done rightly. The Home Office has since practically expressed its approval of the course adopted, for it has refused to mitigate the sentence of one of the convicts, even although I reported favourably of his case. The result was all that could be desired. There has been no repetition of the crime.

Objectors.

I have dwelt thus at length on the utility of Exemplary Punishment in cases of *prevalent* and *exceptional* crimes, because there is an active party of philanthropic reformers who lose no opportunity to denounce the practice and dispute the principle on which it is based. These persons are in truth hostile to *punishment* in any form. They assert that restraint and reformation are all that Society is entitled to apply to criminals who, they carefully add, are only "Society's failures." They contend that we have no right to make one man suffer for the purpose of deterring other men from following his bad example. I have adduced some instances within my own experience of the efficacy of *exemplary* punishments, in order to reassure readers whose judgments may have been for a moment disturbed by these well-meaning but unwise agitators.

CHAPTER XV.

THE CHARACTER OF THE CRIMINAL.

A FORMER chapter contains some comments on the distinction between the classification of *Crimes* and classification of *Criminals*. At the risk of repetition it is necessary here to revert to the latter, for the Judge and Magistrate must take into consideration the character of the Criminal as well as the character of the particular crime.

For the purposes of punishment, Criminals may be divided into three great classes :—

1. THE OCCASIONAL CRIMINAL.
2. THE HABITUAL CRIMINAL.
3. THE PROFESSIONAL CRIMINAL.

Each class requires a different treatment.

Distinction between the "*Habitual*" and "*Professional*" Criminal.

It will be observed that I have distinguished the "*Habitual*" from the "*Professional*" criminal, although no such distinction is recognised by the law, all offenders belonging to these two classes being by the statute placed in one category under the title of "Habitual Criminals," and, as such, subjected to the same treatment.

Having a clear opinion—the result both of experience and reflection—that there is a definite distinction between these two classes of criminals, which the Judge should recognize as requiring a difference

in the award of punishment, I will briefly state the views upon which that opinion is based.

The test of being an *Habitual* Criminal, as recognised by the statute, is that he has been previously convicted and if a criminal has been so convicted he is thereupon deemed to be an Habitual Criminal and treated accordingly.

I dispute both of these presumptions. With all respect for the authorities, I submit that previous conviction is neither sufficient, nor even presumptive, proof that the convict is an Habitual Criminal in the proper sense of that term, nor even within the *intention* of the law; that a former conviction is not a sufficient test of "Habitual" crime, and that the punishment which was intended to apply to those who make a *business* of crime is, by this rude classification, practically extended to many for whom it was not designed and to whose cases it is in fact inappropriate.

Having cast about for a fit name by which to designate the class to whom "The Habitual Criminals Act" was *intended* to apply, I can find nothing better than the term "*Professional* Criminal," which carries to all minds the precise conception it is intended to convey. The Professional Criminal is one who makes crime his calling; who is educated for it and lives by it, precisely as the doctor or the lawyer lives by *his* calling. He and his pursuits are as commonly known to the police as are those of any apothecary with a blue light over the door. He lives in recognised and well-defined thieves' quarters, precisely as do the French in the neighbourhood of Leicester-square or the Solicitors in Bedford-row. The entire body of the professional criminals could be caught and imprisoned in one morning. A class so definite and so readily identified

might well be made the subject of distinct legislation, and it is greatly to be regretted that they should have been in any manner confused with another class with which they have but little in common.

Professional Criminals.

Professional criminals are concentrated in the metropolis and a few of the largest cities and towns. The rest of the country knows little of them, save when they make occasional predatory raids into the provinces for business, pleasure, or health, or for all of these together. But in the towns, outside the quarters of the professional criminals, and everywhere in the country, a large number of criminals are found who, although they may have been previously convicted of petty thefts once, twice, or even many times, are nevertheless not *professional* thieves—that is to say, they do not make plunder their business but *habitually* earn a livelihood by work, and are only weak to resist temptation, especially when prompted by a desire for drink or other self-indulgence. To treat such offenders as we would or should treat professional criminals is an abuse of words, an ignoring of facts, and were Judges to sanction it would certainly prove a great injustice and bring the criminal law into not undeserved disrepute.

For these reasons I trust to have satisfied the reader that, *for the purpose of punishment*, it has been rightly recommended to him to recognise *three* classes of criminals instead of two, as proposed by the existing law.

1. The Occasional Criminal.

By this term—not a very satisfactory one I must own, but adopted for lack of a better—I refer to a class which embraces all those offenders who appear to be such from sudden impulse or great temptation of need

or of opportunity; who are not criminals by *calling* and whose crimes do not exhibit great moral depravity, or any of those features of aggravation which have been considered in the foregoing review of the various *characters* of crimes.

Treatment of the Occasional Criminal.

I cannot too earnestly urge leniency in the treatment of offenders of this class. A first offence should always be looked upon with pity, as possibly a lapse from virtue the result more of weakness than of wickedness. As in such a case repentance and reformation are always possible punishment should be rather by way of warning than of penalty. Opportunity should be given to the criminal to redeem his lost reputation, but with emphatic warning that mercy will not prevail a second time, and that if he sins again in like manner his punishment will be doubly severe. In many of such cases the Judge might beneficially adopt the course of simply putting the convict under recognisances to come up for judgment when called upon, notifying to him that, if he continues in good behaviour, he will hear nothing more of the matter; but that, if he again offends against the criminal law in any manner, he will be brought up for judgment and punished with the greater severity for the offence of which he has been now convicted. The obvious advantage of this course is, that it operates more powerfully than even police supervision to keep the convict from a second offence. The leniency shown to him rarely fails to have some influence in restraining him from relapse into crime. Even if it do not induce reform, the knowledge that if he offends in anything he will be punished on a conviction already secured, with none of the chances of escape that attend a new prosecution, will certainly operate as the most powerful check upon him when tempted again to err.

2. The Habitual Criminal.

Habitual Criminals.

This class of criminals, defining it as above, is by far the most perplexing for those who administer criminal justice. The hard and fast line proposed as a test by "The Habitual Criminals Act," as sent from the House of Lords, namely, two previous convictions, which were to be followed rigidly in all cases with seven years of penal servitude, would have wrought such an intolerable wrong that Juries would have refused to convict and Judges would have taxed their ingenuity to find holes for escape from a law so indiscriminate in its operation. Judges and Justices are continually perplexed how to deal with the petty plunderer, who is not a thief by profession, who works, perhaps, at an honest employment, who would not commit a great crime, but who appears to be unable to resist the temptation of appropriating things of small value that he chances to find unprotected. Penal Servitude for seven years is a punishment so manifestly disproportioned to the nature of the crime and the character of the criminal that it would shock the public sense of justice and bring odium upon the law itself. Yet have short imprisonments been tried upon him in vain. It is certain that, as soon as he is released, after a confinement of two or three months, the old habit will be resumed. The real remedy for such an offender, who cannot exercise sufficient self-control to keep his hands from picking and stealing, would be to place him under restraint for a long term and compel him to work; treating him, after a limited probation, not as a convict but as a labourer for the public, under the control of the servants of the public. But until a more rational system of punishment is provided by the Legislature, Judges and Magistrates can only administer the law as it is; and the best

Punishment.

chance of cure at present permitted is an imprisonment long enough to loosen if not to sever evil associations, to disturb old and to implant new habits. Penal servitude, as contemplated by the original bill, would probably be a better punishment in many of such cases than mere imprisonment. But the nature and uses of such a treatment of habitual offenders are not sufficiently understood by the public to prevent the shout of indignation that would be raised if a criminal were sentenced to seven years of penal servitude (that being the least term which the statute permits to be awarded in case of a former conviction) for some petty theft, even although the prisoner had been twice, thrice, or more often still previously convicted of similar petty thefts and suffered many short terms of imprisonment, but is not a *professional* criminal.

3. The Professional Criminal.

The "*Professional*" Criminal.

There ought to be very little difficulty in dealing with this class of criminals. Educated to crime, living by crime, they commit crime systematically, deliberately, with malice aforethought, calculating carefully the proportion which the chance of profit bears to the risk of detection, capture, trial, conviction, and punishment—all of which are taken into the account. A Professional Criminal is never, or very rarely, reformed. In his mind crime is no sin. No self-reproach follows him; no conscience pricks him. It is his *business*. He fights with justice and its officers as his natural enemies whom to defy, to evade, to defeat, is a boast and not a shame. He weighs the value of his prize against the risk of penal servitude, and if he is caught calls it his ill-luck and hopes for better luck next time. He calculates on

spending a certain proportion of his life in a gaol and adapts himself to that condition, making his prison residence as comfortable as he can by good behaviour while there and compensating for his forced temporary abstinence by revelling in every sensual pleasure when he is again at large. Reformation with such a man is hopeless. Punishment, at least such as it is now, does not deter him because it is his business to hazard it—precisely as the soldier does not shrink from the service although he knows that he must face the chance of wounds and death. It is his profession to risk his life and he does so. It is the profession of the thief to risk his liberty and *he* does it.

Punishment of *Professional* Criminals.

When, therefore, the Judge is satisfied that the prisoner is a *professional* criminal his course is plain. Mercy is wasted on such a man. Leniency is of no advantage to the convict and it is an injustice to the community. The effect of a short imprisonment is merely to send back the plunderer to prey upon society for a time, to be again returned to the dock after he has run up a new score of offences and probably educated a new race of thieves to assist and to succeed him in his business. *Penal servitude* should be inflexibly awarded to a convict of this class, the object of such a punishment being to restrain him for the longest possible period from the exercise of his nefarious calling and to make it more difficult for him to follow it after his release. We may be assured that, let freedom come when it will, his profession of preying upon the public will be resumed with double zest after so long an abstinence.

The only care required in these cases is that the Judge should be *assured* by due inquiry that the prisoner is really a *"professional"* criminal. This

may be ascertained in two ways; first, by the character of the offence itself; secondly, by inquiry from the police.

Proof of being a *Professional* Criminal.

1. *By the nature of the offence.* Certain crimes require an education for their successful accomplishment and therefore the presumption is that the practitioner of them is a professional criminal. Such are, burglary effected with burglarious instruments or in any manner showing the exercise of a considerable degree of skill; pocket-picking, dexterously done, with the aid of accomplices, or where the coat worn has false pockets, or upon the prisoner were found the scissors commonly used in the commission of that crime; or his hands showing by their softness that they have not been employed in manual labour; or the place where done, as at a railway station, a theatre, a race, a fair, or other locality where professional pickpockets usually ply their trade; the possession of skeleton keys, picklocks and instruments used for housebreaking. Indeed, wheresoever there is a conspiracy of two or more for the purpose of committing the offence, the reasonable presumption is that the convict is a *professional* criminal, at least sufficiently to call upon him to show, by some satisfactory evidence, that he has been in honest work; that he is not, as he appears to be, living by crime, but is only an occasional criminal. *Receivers* of stolen goods especially belong to this class; they are not merely criminal themselves, but they tempt others into crime. If, upon inquiry, the Judge is satisfied that the convict is an *habitual* receiver of stolen goods, penal servitude should be inflexibly awarded.

Inquiries to be made.

2. If none of these *indicia* appear in the evidence, the police of the district where the prisoner dwells, or which he frequents, should be asked as to their

knowledge of him. Does he associate with thieves? Has he any honest calling? Who was his employer, if any? Such questions will probably elicit sufficient of his past history to enable the Judge to form a safe judgment whether the convict is a *professional* criminal. But where such an inquiry is made, justice to the prisoner requires that he should be permitted and indeed invited to answer the facts stated against him by any explanation he can offer, personally or by witnesses, and if he refers to known persons in refutation of the charge of being a professional criminal, further inquiry should be made by the police before his sentence is determined and judgment should be deferred for that purpose.

Suggestions for Indictment.

In reference to this class of criminals, I ventured to recommend that the indictment should charge the prisoner with being a *professional* criminal, precisely as it now charges a former conviction; that, after conviction for the particular offence, the jury should try the charge of his being a "*professional*" criminal, precisely as it now tries the question of a former conviction; that the jury should hear the proof of this charge by the prosecution and also the prisoner's answer to it and find a verdict thereupon, and that the punishment affixed to the crime of which he has been convicted should then be increased accordingly from a penalty designed mainly to operate as a warning to one that is designed to operate by way of long restraint.

The reasons I have ventured here to urge for the treatment of professional criminals with exceptional severity, even on a first conviction, with the avowed object of excluding them for a long term of penal servitude from the community which they both plunder and corrupt, are confirmed in the very instructive report of Colonel Henderson on "Metropolitan Crime,"

the substance of which is so well condensed in an article in the *Quarterly Review*, that I make no apology for extracting the passages relating to the subject of professional criminals:

Col. Henderson on Professional Criminals.

That criminals pursue their trade as a regular calling is clear from the number of recommittals every year. The thief who has been once in gaol is almost certain to reappear there. He is not deterred by the so-called "punishment" of the model prison, in which he enjoys food, warmth, and clothing, provided for him at the public expense. So he is no sooner set free than he at once recommences the practice of his vocation. The police had captured him before and handed him over to justice; but after a short term of absence justice restores him to society again. Another round of thefts or burglaries follows; the police catch him again; and again he is handed over to justice, to travel in the same circle of imprisonment, restoration to society, and renewal of burglary and crime. . . . .

These receivers of stolen goods are among the greatest encouragers of crime. They are not only as bad as the thief, but worse. They educate, cherish, and maintain the criminal. The young thief begins by stealing small things from stalls, from shops, from warehouses; or he first picks pockets in a small way, proceeding from handkerchiefs to watches and purses; always finding a ready customer for his articles in the receiver of stolen goods. And when a skilled thief gets out of gaol, without means, the receiver will readily advance him 50*l.* at a time, until he sees his way to an extensive shoplifting, from which he not only gets his advance returned, but a great deal more in the valne of the stolen goods. The number of detected receivers of stolen goods committed for trial in the metropolitan district for the five years ending December, 1868, was 642; being an increase of 38 on the preceding period. . . . .

The police acknowledge, for it cannot be denied, that there is a large class of known thieves abroad — men skilled in burglary, who pursue it as a regular calling. But are the police responsible for these men being at liberty to pursue their nefarious industry? "Why don't the police catch the burglars?" ask the public. The police reply that they have caught these habitual criminals again and again, and handed them over to "justice;" but that justice has again and again let them loose to rob and plunder as before. "Why do not the

police catch the portico thieves?" The reason is that these portico thieves, as well as the skilled burglars, are all old, trained, and repeatedly caught and convicted criminals, who, after each successive capture by the police, come out of gaol with an increased degree of cunning and circumspection, rendering them not only more dangerous as thieves but more artful in evading detection and apprehension. The question which should be asked is, not "Why do not the police catch the burglars?" but "Why is it that confirmed and habitual criminals already repeatedly caught and convicted are let loose upon society to pursue their known profession of plunder?"

The total number of criminals committed to prison throughout England and Wales, in 1868, was 158,480. Of these, 21,189 had been in gaol once before; 9263 twice; 5213 three times; 3557 four times; 2438 five times; 2933 seven times and above five; 2427 ten times and above seven; while 4488 had been in prison more than ten times! The worst thieves and burglars were those who had been in gaol the oftenest. Not fewer than 1343 were re-committed in 1868, who, on previous convictions, had been sentenced to transportation or penal servitude because of burglary, in some cases accompanied by violence; and yet they were again found at large, committing the same crimes, and were again apprehended by the police, and again handed over to justice as before.

It is the same as regards the worst criminal class of the metropolis. Of the 21,498 criminals convicted in Metropolitan Courts during the seven years ending 1868, 2628 were *recognised*(*a*) as having been twice before in custody for felony; 391 had been three times 70 had been four times; and 16 had been five times and upwards. Yet the number recognised probably forms but a small proportion of those who have undergone previous imprisonments. Many old and habitual criminals are not recognised at all, because their previous convictions occurred in other police districts, from which they removed because already too well known there; and even in the case of

(*a*) "To meet the risk of being recognised and its consequences" (says the Ordinary of Newgate, in his recent letter to Lord Kimberley) "old offenders change their names, age, trade, religion, condition, and the particulars of their education,—in fact every circumstance; and many old offenders, notwithstanding the great aptitude of Sessions officers for their duties, by these tricks escape perhaps not recognition, but *legal identification.*

such as have before undergone sentences in metropolitan prisons, identification is not always easy.

The old and hardened criminals, with whose faces the police have come to be so familiar, are, without exception, the worst and most dangerous class of the community. They pursue crime as a vocation, and train up young thieves to follow in their footsteps. Hating work, but loving debauchery, their whole time is spent in contriving how to live upon the labour of others. They think of nothing but picking pockets, robbing warehouses, and breaking into dwellings. These are the people who keep society in constant alarm, and nervous women and children in a state of nightly terror. These accomplished scoundrels, who have taken every degree in thieving, and advanced from area-sneaking to shoplifting, until they have graduated as first-class cracksman, and are at perpetual war with the honest part of society. They have been repeatedly apprehended by the police, and as repeatedly set at liberty; and when another robbery occurs, because the police do not immediately succeed in apprehending them—skilled as they have become in the art of evading detection—loud outcries are raised of "Where are the police?"

It is not the police who are really in fault, so much as that tenderness for scoundrelism of all kinds that has become one of the pervading follies of our time. Modern philanthropy has so busied itself in ameliorating the condition of criminals that the condition of the thief has come to be almost more tolerable than that of the honest working man. We have abolished the severer punishments, done away with transportation, and provided comfortable houses of detention, where convicted criminals are better housed, clothed, and fed than the average of city mechanics. We do not, as we once did, send our convicts to forced labour on unoccupied land in the colonies, but we get rid of our skilled workmen instead, sending them off in shiploads abroad, and keeping our thieves and criminals at home. Indeed, it is scarcely to be wondered at if the honest poor man, struggling to keep out of the devil's ranks, and taxed all the while to maintain the scoundrel class, should begin to think, with Dean Swift, that honesty must, after all, be derived from the Greek work *onos*, signifying an ass.

The convicted criminals have now had every consideration shown them; but the question arises whether some consideration is not also due to those who are robbed, as well as to those who rob—to the wives, daughters, and children of the

rate-paying and non-burglar part of the community, who are kept in constant terror by their depredations. It is notorious that the worst crimes of late years have been committed by criminals out of gaol "on licence," who have been taken red-handed with their tickets-of-leave upon them! Yet the men who are let loose upon society with those tickets-of-leave are almost invariably the most hardened and habitual criminals. "The principle," says the Ordinary of Newgate, "upon which licences are regulated at present is this: he who can do most work, and conforms most entirely to the prison rules, is he who receives most mitigation of sentence. And who is he? The *old criminal*, who has served an apprenticeship to the work and discipline of prison. . . . . My own conviction is, that as a rule (and the exceptions are very rare) mercy is never more undeservedly shown than to a prisoner who has been previously convicted." (*a*)

The tenderness for crime which has grown up of late years has become extraordinary. The common working man, who pays his way, and struggles with difficulty to keep himself and family out of the workhouse, excites comparatively little interest. But, let an atrocious murder be committed, and the whole country is roused to rescue the criminal from the gallows. The burglar may not murder, or intend to murder; yet he is no less the sworn enemy of society. But we have ceased to hang him; we no longer flog him at the cart's tail; we have ceased to transport him; we make him as comfortable as possible in the model prison we have built for him; and we even cut short the term of his imprisonment there and let him loose again upon society with his ticket-of-leave to recommence his depredations. . . . .

"Humanity should be exercised" (says the Ordinary of Newgate) "rather for the protection of those who keep the law than for those who choose to break it; for, in nine cases out of ten, *it is choice, and not necessity, that leads to crime.*" (*b*)

As regards the repeatedly-convicted and habitual criminals, we hold that something more is needed for the security of society than confining them in well-warmed, well-ventilated, well-regulated model prisons for a few years, and then setting them free to pursue their vocation of crime. It used to be

(*a*) Report of the Rev. J. E. Lloyd Jones, Ordinary of Newgate, to the Lord Mayor and Aldermen, 1868.

(*b*) Letter to Lord Kimberley.

said by the advocates of the abolition of capital punishment that the worst use that could be made of a man was to hang him; but surely it is a still worse use to make of a man who has become a hardened and habitual criminal (*a*) to let him loose upon society, after numerous convictions, to resume his vocation of plunder and educate others in criminality.

Why should incorrigible thieves and irreclaimable burglars be left at large? We shut up lunatics for life because they are dangerous to society; but liberate confirmed and habitual criminals who are infinitely more dangerous. Such men have clearly forfeited all claim to personal liberty. Their repeated convictions have proved them to be a constant source of danger to society. We have ceased to banish them; the only remedy that remains is continuous incarceration, with compulsory productive labour. Thus only can society be effectually protected from the injuries and terrors which habitual and irreclaimable criminals inflict upon it.

Propriety of long sentences for professional criminals.

These facts and figures speak for themselves. I can but repeat the expression of an earnest hope that they will receive from the Judges by whom the criminal law is administered the thoughtful attention they deserve, and that the result will be an agreement to look upon *professional* crime as an evil only to be eradicated by treating the *professional* criminal as a foe to the community, who cannot be reformed or

(*a*) In a letter addressed by the Rev. Mr. Lloyd Jones to Lord Kimberley (11th March, 1869), the following passages are worthy of note:—"The greatest difference exists, morally and religiously, between those who are not and those who are habitual criminals. To treat these latter from a humanitarian point of view, securing them from the stigma of *their own vicious choice*, is inflicting a great wrong upon society, and exposing it to great danger. An habitual criminal *may* reform, but, with the greatest advantages, he rarely does. I could give your Lordship instances of habitual criminals being in good situations, when their former course of life is not known, who have availed themselves of the opportunity to concoct plans for extensive robberies; for which purpose they have corrupted their fellow workmen who, till then, had been honest men. . . . I could give your Lordship some valuable information, derived from old convicts sent to prison again for fresh crimes *planned just before their release, from information they had received from fresh arrivals at the prison when they had finished their sentence.*"

reclaimed, and whom therefore it is both wise and just to deprive of his powers of mischief by a long term of restraint. And this, not merely for the protection of the public from his depredations, but also for the purpose of making his profession unprofitable and breaking up his haunts, associations and habits.

And inasmuch as, according to the common consent of all who are best informed, he returns invariably from the gaol to his work of plunder and training of youth to crime, the "one chance more", that should be given to all other criminals on a first conviction, should be refused to him, and his career of crime at once stayed for a longer term than any sentence of mere imprisonment will secure.

The single requirement for the adoption of such a policy by the Judge will be to take all needful precaution, by careful inquiry, to be assured that the convict is *really* a *professional* criminal. If this be denied by the convict, his counsel, or his friends, let sentence be deferred to enable him to produce some satisfactory proof that he is not what he is asserted to be, but has been pursuing some honest employment.

Duty of the Judge in Passing Sentence.

And in passing sentence of penal servitude because the convict is deemed to be a *professional* criminal the Judge should expressly state his reason for the sentence, so that if by any mischance there may have been a mistake as to this, application may be made to the Home Office for a mitigation of the sentence, should the convict be enabled to show that he has been wronged by the representations made of his character and pursuits.

There yet remain a few other conditions affecting the *character* of the criminal, which should be weighed in the determination of his sentence.

SEX.—Although the crime may be the same, it

is found in practice to be impossible to adjudge the same degree of punishment to women as to men. This difficulty, continually confronting every Judge and Magistrate, is doubtless rather sentimental than rational. No reason can be advanced for a distinction, which nevertheless is made in practice and neglect to observe which would be severely blamed by the public. Hence it is that, while a third or fourth conviction properly consigns a male thief to penal servitude, many more convictions will not always suffice to bring down the like sentence upon a woman. This is probably due to the term "hard labour" or "penal servitude," in which the sentence is conveyed. Although no compunction is felt by Judge, spectator, or newspaper at the infliction of labour, however hard, or servitude, however penal, on an incorrigible rascal who lives by plunder, all are averse to condemn a female reprobate to punishments so described. Sometimes it is argued that the same sentence in terms would be a different punishment in fact, as applied to a man or to a woman. But this is an error, arising from ignorance of the manner in which convict prisons are conducted. "Hard labour" applied to a woman is suchl abour only as is adapted to her sex. While men are set to toilsome tasks, women are employed only in washing, sewing, cooking, and such employments as are suited to them and which honest and industrious women pursue as their ordinary daily duties at home; so that, in fact, the real punishment of female convicts is not the hardness of the labour but the restraint and discipline to which they are subjected. In all populous places, and in the metropolis especially, there are many women who spend more of their lives in a gaol than out of it. Surely mercy so called is not mercy in such cases. A short imprisonment is absurd.

Distinction in punishment according to Sex.

As soon as the convict is free again she resumes her old habits. For such women the truest mercy is to lock them up, keep them employed and make the repetition of crime impossible by depriving them of opportunity and temptation. After a fair trial given to short sentences of imprisonment, if these fail to secure honesty, the rightful sentence will be to remove them from the community on which they systematically prey for so long a time as to afford some chance of breaking, by that disciplined life which penal servitude only can secure, the chain of evil habits and associations by which they are bound to a life of crime. Where it appears that the female convict is an accidental and not an habitual offender, especially if she be young, it is politic as well as merciful to save her from the ruin too often consequent on the moral degradation of a gaol and if the employer can be persuaded to take her again into his service, or if any friend or relative will undertake to keep watch upon her, it will be by far the better course to put her upon recognisances to appear for judgment when called upon, with a warning, as before suggested, that if she offends again she will be doubly punished for what she has now done.

Temptations to be considered.

THE TEMPTATION.—Criminality is really measured, in some degree, by the amount of temptation to which the criminal was exposed. It is impossible to lay down any rules by which the various shades of temptation can be defined. It will be enough to remind the Judge that it is an element in the estimate of guilt, to be taken into account in apportioning punishment.

If a first offence.

IF A FIRST, OR REPEATED, OFFENCE.—This, though the last, is perhaps the most important, matter for consideration in relation to the criminal; for he who has had so emphatic a warning as a trial, a conviction, and punishment, can plead none of the excuses which may

be properly urged in behalf of first offenders. His criminality is, indeed, very largely increased by the fact that he is an old offender, even although the particular crime with which he is now charged may be in itself a lesser crime in degree than that of which he was formerly convicted. Hence it is that the law properly makes the fact of the committing of a crime after a previous conviction an offence in itself, apart from the particular character of the new offence, and visits it with a severe punishment, in addition to the punishment that would have been awarded to the crime of which the offender is now convicted. To so great an extent is this principle recognised by the law that, on a second conviction, the court has no option, if it sentences to penal servitude, but to inflict it for seven years. Certainly there never was a law that more entirely defeated its own object. It was designed to increase the severity of punishment for old offenders. By compelling a sentence of not less than seven years of penal servitude, it has forced upon Judges, conscious of the excessive severity of such a sentence in many cases, the alternative of inflicting an inadequate penalty of imprisonment where the proper sentence would have been three or four years of penal servitude. Thus it has come to pass that, by aiming at excessive severity, the law has practically driven reluctant Judges to excessive leniency.

Compulsory sentence.

The rules, as nearly as they can be defined, for dealing with old offenders may be thus stated:

Careful inquiry should be made into the nature of the former charge, the length of time that has since elapsed, what the prisoner has been doing during the interval,—if he has been pursuing an honest calling, or otherwise—in short, if this second offence, as well as the first, wears the complexion rather of *accidental* or

Treatment of old offences.

occasional, than of *professional* or habitual crime. If so it shall prove, then one more chance should be given to the convict, but of course with a more lengthened sentence of imprisonment and accompanied with emphatic warning that it is the last escape he will have from penal servitude. If, on the other hand, the history of the criminal, before and since the former conviction, or the nature of that or of the present crime, indicates that he is a *professional* criminal, mercy in such case is wasted upon him and is injustice to the community. The truest mercy to both is to remove him for a long period from his old habits, haunts, and associates, and to relieve society from the presence of one who would certainly continue to prey upon it while he is at large, because crime is his profession, because he knows no other calling and because he prefers it, with all its hazards, to honest industry.

CHAPTER XVI.

CIRCUMSTANCES OF AGGRAVATION.

HAVING thus attempted to trace something like a principle by which the judgment may be assisted in measuring the various degrees of punishment to be awarded to the various classes of *crime* and to some special cases in such class, we pass on now to consider the further modifications of punishment consequent upon the circumstances attending the offence that aggravate guilt and should increase the punishment. The Judge or Magistrate must for this purpose take into account, not alone the character and circumstances of the particular offence, but also the *character of the criminal*, and that is perhaps the most important item in the determination of the penalty.

In this chapter will be considered the circumstances of *aggravation*. In the next the circumstances of *mitigation*.

Classification. Nothing more can be attempted than a very rude classification of these claims upon the special consideration of the Judge. They rest more upon the characters of the criminals, who may be roughly classified thus:—

1. The Professional Criminal.
2. Receivers.
3. Tempters to Crime.
4. Plunderers of unprotected property.

5. Railway Plunderers.

Of such in order.

1. The Professional Criminal.

By this term I intend the man who makes crime a calling and pursues it as a profession. He has been fully treated of in the last chapter and to that the reader is referred.

2. Receivers.

Receivers of three classes.

Receivers are guilty of a double crime. Not only are they themselves criminals, but they tempt others to become criminal, profiting by the crimes they have prompted and doing their best to ruin, body and soul, the victims they have manufactured. The saying is as old as the law, that if there were no receivers there would be no thieves. But the law should have marked the magnitude of the crime by the magnitude of the punishment, distinguishing the degrees of guilt in the three classes of Receivers, namely (1),

1. The *Accidental* Receiver.

the *Accidental Receiver*, who comes into unlawful possession of stolen property through some accidental circumstances. (2) The *Professional Receiver*, who trades in stolen property, and who is known in police phraseology as a "fence." (3) The Receiver who deliberately assists servants to rob their employers. This classification of Receivers according to the degrees of their criminality is not recognised by the law, which might with advantage have thus marked by three distinct degrees of punishment the different degrees of guilt. They are offered here to suggest that what the imperfect law has failed to do the Judge and Magistrate should do. In *all* cases the Receiver should be more severely punished than the thief. If from any extenuating circumstances it is thought fit

to mitigate the sentence of the Receiver, for the sake of example and to preserve the rule, a definite proportion should still be observed between the sentences of the *Receiver* and the *Thief* by reducing also the punishment of the latter, *always taking care to award a distinctly greater punishment to the Receiver.*

2. The *trading* Receiver.

With the *second* class of Receivers—the *regular trading* Receiver, who makes a business of dealing with thieves, inasmuch as detection is difficult and the wrong done to the community immense, the sentence of penal servitude for five years should be the least to be passed upon him, and if the trade has been long-continued, extensive, and artfully conducted under an outside show of respectability, it should be heavier still. Few readers can have failed to notice that Receivers of this class are always enabled to call a swarm of witnesses to character, prefaced by an earnest appeal to the jury against the probability of so respectable a man being in alliance with thieves or engaging in such a traffic. But the value of reputation in these cases is very small indeed. For the most part it is by reason of the outside show of being well to do and the flavour of respectability —a good shop—decent aspect—sanctimonious professions—the pretence of carrying on some regular trade —that the FENCE contrives to evade detection. His *character* enables him to conduct his nefarious traffic with impunity, and it is wonderful how long Receivers of this class in the metropolis and the large towns can contrive to carry on their business, evading the vigilance of the police so far as to escape prosecution, although their doings are perfectly well known. When caught at last their punishment should be exemplary.

Tempters of servants.

The *third* class of Receivers comprises those *who*

tempt servants to rob their employers. This is a very numerous class, exceeding both the other classes combined. Sometimes they buy from servants goods they cannot fail to know must have come from their employers, such as articles of their manufacture, tools in their use, and so forth. Sometimes they directly tempt the servant to steal for them—as in the too frequent case of corn procured from coachmen and grooms and hay from carters carrying it to its destination. In all such cases the Receiver is guilty of a double crime—he is the manufacturer of the thief—and should be punished accordingly. The rule I ventured to adopt many years ago, and to which I have steadily adhered in spite of some objections, has been and is to award to the Receiver *exactly double* the amount of punishment given to the Thief, at the same time stating the rule and the reasons for it, so that it may be understood by the public. From this rule I have had occasion to make but few exceptions under some very special circumstances.

Punishment.

Apart from its obvious justice and propriety, the benefit of such a known rule of punishment, in its operation by example, is found in practice to be very great. The rule itself and the reasons for it are readily understood and remembered. Such a rule strikes the imagination vividly; it is directly associated with the crime; more than all, it commends itself to the judgment of the community, whose approval of punishments is ever to be desired, and who therefore should, if possible, be given to understand the reasons that determine them.

3. Tempters to Crime.

Tempters to crime.

In addition to the Receivers last treated of, there is a class of *Tempters* to crime, creators of criminals,

whose offence calls for exemplary punishment. These are usually found in the persons of relatives—too often parents—who prompt children and young persons to plunder their employers and others, aiding them in the doing of it by providing facilities for disposition of the spoil. Sometimes the tempter is a superior servant, who hopes to do safely by the hands of another what he fears to do with his own hands. But whatever the relationship of the parties, the guilt of the tempter is vastly greater than that of the tempted, and should be punished accordingly and the reason for such exemplary penalty should always be explicitly stated in passing sentence.

4. Plunderers of Unprotected Property.

Plunderers of unprotected property.

There is a very large amount of Property which from its nature cannot be protected by the owners and to which, therefore, the laws of all civilized countries have sought to give protection by penalties of exceptional severity. The principle upon which such laws are based is, that the temptation offered by the facility for plunder should be counteracted, as far as possible, by fear of the painful consequences to follow upon detection.

Formerly, and even within my own memory, our law carried this wholesome rule to an extreme severity that often defeated itself. Cattle-stealing was punished with death and at a single assize I have seen half-a-dozen men sentenced to be hung for this crime, some of whom were actually executed. A reprieve was in all cases followed by transportation.

The letter of the law has been greatly mitigated in this respect and the practice of the Criminal Courts has introduced yet greater mitigations.

Cattle stealing.

It may be questioned indeed whether, as is usual, the leaning has not been lately too much the other way. The stealing of horses, cattle, poultry, timber, fencing, and stored crops, of necessity exposed in open fields, sheds and yards, where no vigilance can guard them from depredation, is now often treated with a leniency as inconsiderate as was the ancient severity. It is for the Judge and Magistrate to carry out the *intention* of the law by dealing with this class of crimes as offences *aggravated* by reason of the facilities for their commission, adding to the punishment due to the act of stealing a further punishment by reason of the place chosen for the commission of the crime. In the cases of horse and cattle stealing from fields, the least sentence substituted for the former capital punishment should be imprisonment for eighteen months, and if this form of crime is shown to have been a business, as in most cases it is, penal servitude should invariably follow the first conviction.

Fowl stealing.

Fowl stealing is less in degree of guilt only because the property is of less value. The circumstances of aggravation are almost the same as in cattle stealing—the mitigating circumstances are not greater. It is a crime even more easily accomplished, and much more difficult to detect, because of the facility for concealment and disposal of the property and the obstacles to identification, which make convictions so rare that it is a crime practised with comparative impunity. When a conviction is by good fortune obtained, the punishment should be severe. This, also, is rarely found to be an isolated offence. It is a form of crime habitually pursued by those who take to it, and this should be an added ingredient in the measure of punishment.

5. Railway Plunderers.

Plundering on Railways.

This is a new class of criminals consequent upon the special facilities for crime provided by the crowds of persons and piles of property brought together at railway stations and against which all the vigilance of the officials is incompetent to protect them. This form of plunder has become a regular branch of the profession of thief and is carried on to an amazing extent with comparative impunity. Railway pick-pockets appear in groups of two, three, or more upon the platforms, provided with tickets to the nearest station. They look out for a promising victim. There is the usual rush for seats. They surround the door of the carriage he is entering and appear as if thrusting to obtain a place for themselves. An easy opportunity is thus provided for the transfer of the watch or the purse, the loss of which is not usually discovered in the moment of excitement, and when the seat is taken and the train moves on it is too late to trace the thieves, who have vanished into other carriages. Hence but a fraction of the pocketpickings at railways are detected and the harvest is great accordingly. The other popular form of railway robbery is stealing portmanteaus and dressing-cases expected to contain property of value. The ingenuity displayed in the accomplishment of these robberies is sometimes extraordinary. Two or more confederates, dressed as gentlemen or ladies and even holding first class tickets, play their parts in the plot. A more vulgar form of the crime is to appear as a porter and take a portmanteau from the waiting room when the whistle signals the departure of the train. If seen and stopped, there is an apology for having mistaken either the property or the person. So, on the arrival of the

train, the thief, well dressed and got up, personating a traveller, claims a promising package as his own and walks off with it. All of these crimes are the acts of *Professional Criminals* and should be invariably punished as such. Detection rarely indeed follows a first offence and probably many successful plunderings have preceded the unlucky adventure that has brought the thief within the grasp of the law. This should be remembered in measuring the punishment, which should be exemplary *in all cases*, never being less than eighteen months imprisonment for a first conviction, and on second conviction, or if the proofs of many plunderings be found, as always they are on search at the prisoner's residence, the sentence should be inflexibly of penal servitude.

CHAPTER XVII.

MITIGATION OF PUNISHMENT.

Mitigation of Punishment.

THE statute law has affixed to each class of offences a distinct penalty. Simple larceny is punishable in one manner — larceny by a servant in another — murder, by death—robbery with violence, by whipping and so forth.

The few offences that remain such at common law—that is to say, not the subject of statute law—are punishable under very vague penalties of fine or imprisonment, or both.

But the statute law invariably declares the *extent* of the punishment to be inflicted for the particular offence. It does not limit the minimum of punishment.

Power of the Judge.

Thus is the Judge invested with a large power to mitigate the legal penalty attaching to the crime in the abstract. Although simple larceny is punishable with imprisonment for two years, the Judge is permitted to mitigate that penalty to any extent he may deem to be required by the circumstances of the particular case.

And this power has been wisely given to him. Crimes the same in kind are not always the same in quality. There are infinite degrees of guilt in offences called by the same name. It is at once the duty and the privilege of the Judge to measure the degree of

guiltiness in the criminal who has been convicted, and to determine if, and to what extent, he may properly mitigate the legal penalty that attaches to his crime.

Inquiries to be made with a view to mitigation.

For this purpose INQUIRY will be twofold: 1st, he will consider the circumstances of the *crime;* 2nd, the character of the *criminal.*

1. The circumstances of the crime.

First, as to the circumstances of the particular crime. Was it a sudden impulse, or premeditated? Was it contrived with skill or the clumsy cunning of ignorance? Was it attended with any violence to the person or the use of any force? Was it likely to damage other property and do an injury much beyond the value of the article taken—as stripping lead from a roof, for instance, in which the thief inflicts ten pounds worth of injury for the gain of a shilling? Was the theft of horses, cattle, stacked hay and corn, and the like, such as can be secured only by the protection of the law because of necessity exposed to plunderers? Was any undue temptation offered to the convict, as by imprudent exposure or absence of reasonable care in guarding the property? Many other questions may be suggested as those which the Judge should pass in review before him in determining the sentence. These are adduced only by way of illustration.

2. The character of the criminal.

Secondly, the *character of the criminal.* This is even more important to be considered than the character of the crime of which he has been convicted. Careful inquiry should be made as to this and, if necessary, sentence should be deferred for information. As already stated, at the Middlesex Sessions an "Inquiry Officer" is appointed for this purpose and in London the policeman having charge of the case is also instructed to inform himself, so far as he can, of

the antecedents of the prisoner. He inquires at any address given. He sees employers and ascertains their knowledge of the accused. The results of this are not communicated until conviction, so that the jury may be in no wise prejudiced by ill reports. But the information thus obtained greatly assists the Judge in resolving what the sentence should be. If these inquiries fail, or other facts appear in the course of the trial, the "Inquiry Officer" is directed to pursue the investigation. I have deemed it right in such cases to ask the convict if he would like to give me any account of himself, or if there are any persons known to him to whom he desires that reference should be made as to his past behaviour, and if, as often happens, such references are given, the Officer is instructed to see the parties so named if in London or to write to them if in the country. Sentence is then deferred accordingly.

Similar arrangements might be adopted with advantage everywhere.

The primary point to be ascertained is if this be the *first* conviction or complaint?

Direction of inquiry.

Is the prisoner an *Habitual* or an *Accidental* Criminal?

No conclusion can be formed merely from the fact of the absence of any charge of former conviction in the indictment that the prisoner has not been an habitual criminal. Professional thieves continually change their names. It is their policy never to carry the old name to a new locality. The publication of a *name* in the *Police Gazette* consequently does little towards procuring proofs of a criminal's antecedents, and it is difficult to describe features by words. The recent practice of photographing the prisoner has done much to remove difficulties of identification. But even

Former convictions.

this silent testimony has been dexterously evaded and likenesses are often hard to trace when the hair is cut and a beard, moustache, or whiskers grown or shaven. Hence a considerable number of former convictions fail to be traced in time to be charged in the indictment and recognition is not made until the prisoner is seen in the dock. Where a previous conviction is charged and proved, other convictions should be reported and taken into consideration by the Judge.

Nature of the crime to be considered also.

Nor are former convictions the only sufficient evidence that the convict is a professional thief. This can often be gathered also from the nature of the crime. Burglars, pickpockets, card-sharpers, pot-stealers, lead-stealers, area sneaks, shoplifters, are in the great majority of cases (not always) *professional* thieves—that is to say, the *presumption* is that they are such—and inquiry should be directed to ascertain if the fact is other than as it so appears. To this end the convict should be asked if he has been lately in honest employ and where the person to whom he refers could be seen, to learn if hitherto he has been really obtaining his livelihood by honest industry.

In a former part of this book various reasons are given why professional criminals should always be treated with exceptional severity and very little mitigation of the legal penalty allowed to them as a rule. But if the inquiry should show the convict not to be that which from his crime he appears to be, but only an accidental criminal who has chanced to take to the suspicious class of crime—mitigation of the punishment should be to an extent that will operate as a warning. He should be treated as any other accidental criminal would be treated.

If the prisoner is found to have borne a good

character hitherto and there is no reason to suspect any former crime and if the circumstances of the case point to the probability of a yielding to sudden temptation or that the criminal was misled by others more wicked than he, it becomes a grave question how to deal with him. Leniency will be preferred by all. But what form may leniency best take ?

To this question I invite the particular attention of the reader. I have ventured to arrive at a firm judgment upon it and to act in pursuance of that judgment. The practice has been received with approval by some, with censure by others, as commentaries in the newspapers have shown. But no complaint of it has ever come to me from the Home Office and until rebuked by that authority I must continue its observance, for I have found it to answer admirably in practice.

What should be the *mitigation* of punishment.

Assuming, then, a desire to mitigate the penalty in either of these cases—what should that mitigation be ? The choice lies practically between a short imprisonment and no punishment at all.

When the Prison Congress assembled in London in 1874, I availed myself of the opportunity provided by such a gathering of authorities from the Continent of Europe and America to learn their experiences of the practical effect of the punishments it was my almost daily duty to award, hoping thus to obtain some practical guidance in the formation of my own judgment upon many points on which I had been doubtful. One of these was the effect upon the criminal of various terms of imprisonment. I found them very kind and communicative but by no means unanimous. Advisers of two classes presented themselves at the meetings, one of whom may be designated *Prison Philanthropists* and the other *Prison Governors*.—The first were possessed with one idea—that a criminal is what they

Opinions of the Prison Congress.

called "society's failure," and that the single purpose of imprisonment was restraint with a view to reform. The *Prison Governors* took a more practical view of the object of punishment. With two or three exceptions these experts indorsed the assertion upon which I adventured (amid a shout of "No, no!" from the Philanthropists), that the primary purpose of punishment by the law was to deter others from offending in like manner. It was necessary to have this clearly before them, because my inquiry had reference to the punishment that would best secure the object of punishment. The great majority of these experienced authorities disapproved of short sentences of imprisonment, on the ground that they failed in *both* objects of punishment—the deterring of others and the reforming of the offender. They admitted that cases sometimes occur in which a short sentence is effective, but such were exceptional. They were of one accord in deprecating brief imprisonments for young prisoners.

Reviewing these authoritative opinions afterwards, I am bound to say I did not feel altogether satisfied with them. I noticed that, while repudiating the philanthropic principle, they were not a little influenced by the doctrine that reform was the chief, if not the sole, object of a prison—a notion not unnaturally fostered by the fact that this object of reformation constituted the main duty in *their* relationship to the criminal. On such an assumption they were right. Reform of a criminal nature cannot be accomplished in one, two, three, or even six months. If reform by a moral or mental change be the only, or the primary, purpose of punishment, a small crime would require a long imprisonment. But humanity recoils from such a conclusion. The utmost that can be attained in such

a case is to deter the criminal from a repetition of his crime by fear of a larger measure of that penalty of which he has tasted enough to make him dread an extension of it.

And this is the appropriate punishment for first offences unattended with circumstances of aggravation. The object should be an emphatic warning. The penalty should be sufficient to make the criminal suffer so much as will deter him from renewing his evil courses, but no more than this. The sentence should be accompanied with a distinct intimation that, because it is a first offence, so slight a punishment is inflicted by way of warning and in hope that the criminal may learn what the pains of a prison are and resolve to avoid them for the future.

An alternative.

But there is yet an alternative which, having employed it to a considerable extent, I can very confidently recommend. Even a short imprisonment is a severe punishment to one who has not been an habitual criminal and who has never experienced the loss of personal liberty. It is not the pain he endures within the prison walls; the greater penalty by far is the loss of his position socially, the blight upon his home, the difficulty of obtaining employment and the jeers of his fellows. If this ruin of character can be avoided, many cases present themselves to the considerate Judge in which it will appear to him desirable so to do.

Recognizances to come up for judgment when called upon.

Recognizances to come up for judgment when called upon provide this desirable alternative. Practice has proved to me the excellence of this substitute for punishment and with growing experience I am more and more inclined to its adoption. It is, in my view of it, infinitely to be preferred to the short imprisonment so decidedly condemned by the prison authorities. It gives to the criminal who has made

only a first step in crime a chance of redemption under the most favourable circumstances. He goes from the court without the stamp of penal discipline upon him—with a public recognition that he is not utterly lost—that the Judge had hope of a good future for him —that he was not yet registered as a convict—that he had been the subject of mercy after all the facts connected with his fault had been taken into account. These are considerations in themselves calculated to induce, if anything can, reformation. All the sermons in the world would not preach to the guilty man at the bar the short lesson that comes from the lips of the Judge and is burned into his memory: "You have been rightfully found guilty of this offence. I have inquired into your history and I am glad to learn that hitherto you have borne a good character and so far as is known this is your first lapse into crime. In the anxious hope that it will also be your last offence, that you will strive by future good conduct to regain the good character you have lost, it is not my intention to inflict upon you any punishment. If some friend will become bound for you to bring you up for judgment when called on, you shall leave that dock a free man. So long as you conduct yourself properly you will hear nothing more of this, and I trust that in time your fault will be forgotten by others as it is forgiven by me. But if you offend again against the law in any manner, you will be brought up on this conviction and then severely punished for what you have now done. Go home now and by your good conduct show your gratitude for the mercy that has been extended to you."

Advantages of.

The suspension only of the judgment, the knowledge that if he offends he may yet be punished—the hold which his bail thus has upon him, to a great

extent guarantee that if there is in him an inclination to redeem himself he will return to a life of honesty.

Experience of this.

And experience has amply confirmed this anticipation. I am aware that I have been blamed for having more largely used this power than has been the practice with Judges. But the results are the best justification. No exact account has been taken of the number of convicts so treated during the last twelve years, but it must be considerable. It is a remarkable fact that of all the many cases so dealt with, in *two* instances only has it been found necessary to require the offender to come up for judgment under these recognisances.

On the other hand I have received repeated assurances of the good effect of the course so adopted. Years afterwards letters have come expressing the profoundest gratitude to me for having been the means of saving the writers from ruin. One instance is so remarkable that the reader will perhaps excuse a reference to it in illustration of the argument.

Instances.

Two young men, brothers, had landed from an American ship. While rambling about London they had spent their money and wanting more to pay their lodgings had been tempted to take some article from a shop. They pleaded guilty and in pursuance of a practice I have observed where no account of the convict can be given by others, I invited them to tell me who and what they were and their inducements to crime. They had come from New York, where they had friends, and but for this offence, which they appeared bitterly to lament, they were to have sailed on the return voyage in a few days. Having caused inquiry to be made as to the truth of this, I resolved to discharge them on their own recognizances, on a promise that they would at once

go back to their ship and return with her to America; telling them that if they remained in England for a week they should be at once arrested and brought up for punishment. They expressed the utmost gratitude at the unexpected mercy shown to them and left the dock. Two years afterwards I received a letter from New York in which the writers reminded me of this act of grace to them—stated that they thought I might be pleased to learn that it had not been thrown away—that they had got into respectable situations and were doing well and that they owed their salvation to me.

Young criminals.

The most perplexing duty of the Judge and Magistrate is to deal with young criminals—boys or girls. The modern introduction of reformatories has not removed all the true difficulties of the problem, while providing a ready resource that too often tempts us to resolve the doubt by adopting an alternative that has much to recommend it to our feelings. A school instead of a gaol—to be fed, clothed, educated, and provided for—is certainly a magnificent boon which it gratifies our benevolence to bestow. The greatness of the gift and some thought of those at whose expense it is made should, however, induce careful consideration before such a method of dealing with juvenile crime is adopted.

Boys.

In the case of boys, the choice lies between the prison, the birch, and the reformatory. These punishments are contrived with different objects. The prison is designed to deter the young thief from repeating his crime by fear of the consequences and others, through the same fear, from following his example. The birch is intended to operate in the same manner, only it is more effective because more dreaded than the prison. But the reformatory is established for the single purpose of reforming the

Reformatories.

criminal. It does not, and probably is not designed to, advance the other object of punishment, the deterring from crime by example of the pain suffered by the criminal. If the reformatory has any effect out of doors it must rather be to promote crime in others, by showing parents that a dishonest child is better cared for than an honest one. The practical lesson it teaches is that the poor fellow who trains up his child in the way he should go must maintain him by his own labour, while his neighbour, who neglects his children for self-indulgence in drink, is kindly relieved from the charge of them. Nor this alone. The bad child of the bad parent is in fact better fed, clothed, educated and cared for than is the good child of the good parent. That this is felt by the poor I can vouch from personal experience. "A blessed thing, Sir," said once a poor woman to me, "to have your child a thief. There's Nelly Jackson's son, who stole the spoons, has got his warm clothes, while my poor boy hasn't enough to buy a new pair of boots. He gets only a morsel of meat at home, while that little thief, Ned Jackson, has his belly full. I'm forced to work for my good boy and Nelly has got her bad boy provided for. Don't you think it's a sin and a shame, Sir?" I tried to point out to her the pride she ought to have in her boy's virtue, and the shame Nelly must feel at having her boy in a Reformatory. But I fear my arguments failed to satisfy her. The fact remained that the young thief was far better cared for *because he was a thief* than was the honest youth. Something about 40*l.* per annum was in fact bestowed upon him at the public expense—a sum almost equal to the entire income of the honest family.

Evils of.

This is the unpleasant side of the Reformatory question, but it is a real difficulty and danger not to

Benefits of.

be omitted from the calculation, but to be weighed against its equally undoubted advantages, which are twofold. First, the Reformatory removes the juvenile criminal from the scenes in which and by which his criminal tastes are cultivated and thus relieves the community from a present nuisance and a future danger. Secondly, it drags the youth himself out of the career he has commenced and gives to him the best chance of developing into an honest man instead of a professional criminal. These are undoubtedly immense advantages to be balanced against the very real disadvantages described. The calm judgment will probably deem the good to outweigh the mischief, and upon the whole will approve the reformatory system. But the fact that it is only a balance of benefits should not be forgotten by those who practically administer the law, so as to restrain in them the too ready resolve to send to a reformatory *all* juvenile criminals whose age permits of such a sentence. There are many circumstances to be gravely considered before this course is adopted.

Inquiries before sending to Reformatory.

Thus inquiry should be made into the circumstances of the *parents*. If they are decent people, and have means to provide for the boy at home, they should not be thus relieved of their parental responsibilities at the public expense. True, the law demands of parents a contribution towards the cost of the maintenance of his child in a reformatory. But this is rarely paid; and even when exacted it does not cover one-fifth of the actual cost. This example of relief from parental burdens and duties is undoubtedly most mischievous, and therefore if the parents of the young criminal are competent to the performance of their duty, they should not be released from it. In such case, if the crime permits of it, a birching is the best punish-

ment; or if that be inappropriate to the offence, the father may be called upon to enter into recognizances to bring the boy up for judgment when required.

So likewise some consideration must be given to the *character* of the young criminal, so far as it can be ascertained by inquiry. Some boys are too bad for a reformatory. They would teach more evil to others than they will learn for themselves of good. A young Jack Sheppard would ruin half a school. A boy who is the hero, real or pretended, of criminal enterprizes becomes the envied hero of the reformatory. This is not the kind of thief to be sent into that company and great caution is required to avoid such a mischance. An imprisonment and a birching would be the best punishment for a delinquent of this class. Character.

The question of *age* is also important. It is useless to send a boy to a reformatory for a year, nor, I believe, for less than three years. The law permits a committal thither under the age of sixteen. But a boy of fifteen would be kept in the school for one year only, so that the sentence would practically be avoided. In such case, if a first offence and otherwise without aggravation, recognisances to come up for judgment will suffice. If his history proves to be unfavourable, then imprisonment—but then only. Age.

The reformatory is especially adapted for the class known as gutter children, who have no parental care, whose associations are all with criminals, and who will certainly grow up to be criminals themselves unless removed to another atmosphere.

The same remarks apply to *girls*, but with them the only alternative punishments are the prison and the reformatory, and the latter should always be preferred Girls.

to the former. But if parents, or friends, or any benevolent society or person, can be found to take care of them (and I have frequently received such offers from strangers who have read the reports of their trials), such a dealing with young girls should always be preferred to either form of punishment, giving the benevolent protector a hold upon her by entering into recognisance to bring her up for judgment should any future misconduct render such a course desirable.

With boys when the reformatory is out of the question and the prison undesirable, I am accustomed to ask the young convict if he would like to go to sea rather than to prison.

Sending young convicts to ships.

If he is already familiarised with the interior of a gaol invariably he prefers the prison to the ship. Unfortunately the choice is with him, for the Court has no power of compulsion. When the ship is chosen, sentence is deferred while a very useful officer of *the Discharged Prisoners' Aid Society* finds a place for him. Then he is brought up, bound in his recognisance to appear for judgment when called on, and committed to the charge of Mr. HAYWARD, who conveys him to the ship, with an intimation that if he does not perform his engagement or runs away from the ship after his service has begun, he will be brought up for judgment and then severely punished. This somewhat roundabout course is necessary in such a case, because, if a short sentence is passed, on its expiration the lad is free and all further command over him is lost. He might refuse even to enter the ship, or leave it next day, and no authority could retain him. But by recognisances for judgment he is held in a bond that will permit of his arrest at any future time should he misconduct himself. Hence it is that

this method of dealing with such a case is so much more effective than a slight punishment.

After conviction, a boy cannot be sent to a training ship—that best of all institutions for utilising vagrant youths. The motive for the exclusion is a good one—to prevent the degradation of the unconvicted and previously honest by association with the convicted. But the Judge and Magistrate has frequently occasion to regret that some analogous provision is not made for convict boys who might be compulsorily sent to a ship instead of a reformatory or a prison. Why should there not be a reformatory ship as well as a reformatory school, limited to the reception of the *convicted* only ?

Unfitness for a reformatory.

Even when the criminal is within the age that limits the sending of him or her to a reformatory, the question arises if such a course should be adopted. It is not so readily answered as the inexperienced might suppose. Such a dealing with youth is not always the most desirable. Although the law permits this course to be taken up to the age of sixteen, there are obvious difficulties when that limit is approached. Reformatories are schools, and their benefits cannot be obtained in a few months or even in a year. The discipline of *three* years is the least at which the unformed minds of the class for whom these institutions are designed can be trained to anything like education of mind and reform in *habits*—the latter being the most effective of the two operations. But if a boy is sent to a Reformatory at fourteen, he is a young man before his sentence expires, and it is not intended to be a school for men. As a general rule a boy of fourteen is too old for a reformatory. He will be too soon beyond its discipline. Then, again, a boy may be too bad to be so treated. It may seem a paradox, but it is literally true. A

reformatory is, indeed, a school for young criminals,—a boy cannot be sent there unless he has committed a crime. But there are degrees of criminality even among the young. A boy born and nurtured in crime, whose whole existence has been a life of plunder, who is profoundly versed in the ways and talk and skill of the professional criminal, could not fail to become a teacher of crime to his less guilty companions. Instead of being himself reformed he would become the contaminator of others and one such boy in a reformatory school would undo all that the teachers were doing. Again, if the youthful convict has parents or friends competent and willing to take care of him, it is unjust to the public,—(that is, in plain language, to the poorer people who pay for it in the shape of rates and taxes)—that the natural guardian should be relieved from his natural obligations and that his child should be better taught and fed than are the children of those honest people who pay the cost. Such cases I prefer to remit to the parent, if it can be done with any prospect of proper care. Only when all these resources fail is it right to sentence a young person to imprisonment. If the criminal be a boy, there still remains a resource which, if he is too bad for the reformatory, he is likely to regard with more wholesome dread than any other, viz., two days of imprisonment and a birching, which means that next day he shall be whipped and discharged—smarting. Thus he is not rendered by familiarity careless of a prison; he does not escape unpunished; he finds a penalty which gives him pain and is remembered, but which does him no harm beyond the temporary smart.

Dangers of example.

Boys above sixteen.

The formidable difficulty occurs with boys who are above the age for a reformatory or a whipping and yet who are not men. The law leaves no choice but

imprisonment. Age is not a test of fitness for special treatment. Some boys are older at twelve than other boys at sixteen. Then, the young thief, knowing the limit of the law, calls himself "sixteen last birthday," though looking no more than twelve. True, that the Judge may form his own opinion of age and is not bound by the prisoner's statement, but there is a reasonable reluctance to set mere opinion against a positive assertion. In such case it is, perhaps, prudent to observe the same rule—if a proper guardian can be found, let him go on recognizances. Failing this there is no alternative but the prison.

Short imprisonments.

Is such case the imprisonment should not be short. There is no difference of opinion among the prison authorities as to the unfitness of a short imprisonment for juvenile offenders. It accomplishes all the mischiefs of a prison without the countervailing benefits. The dread of the gaol is lost and no moral checks can be substituted in the brief time so permitted. Whatever evils a prison can produce can be learned in a month—the good that discipline is designed to inculcate cannot operate in thrice that time. The difficulty in awarding a long imprisonment to a young offender consists in the certain misapprehension of it by the newspapers and those who write sensation articles for them. Denunciation of the barbarity of sending a young boy to gaol for six months for stealing something of small value will certainly engage the pens of gushing correspondents. But it is not the less *true* that the sentence is an act of real kindness, by reason of the bodily, mental and moral discipline to which he will be subjected.

CHAPTER XVIII.

ABUSES OF THE CRIMINAL LAW.

A FEW words of warning, as the lesson of long experience, may not be unacceptable.

The Criminal Law is too often abused by resort to it for the enforcement of claims for which the proper legal remedy is a civil one, if any.

Use of the criminal law to enforce civil claims.

There is another form of this abuse even more to be deprecated; the employment of criminal proceedings, or the threatening of them, for the purpose of inducing by its pressure the defendant or his friends to make compensation in cash for a wrong done which is really criminal, but the prosecution of which is not undertaken with any desire for public justice, but simply to obtain from fear of the dock what could not be obtained by fear of any civil procedure.

Debtors' Act, 1869.

The first of these mischiefs has been especially conspicuous since the provision of the Bankruptcy Act that made obtaining of credit by fraud a misdemeanor (32 & 33 Vict. c. 62, s. 13). This enactment was well intended and aimed at a very real evil for which the old Bankruptcy Law provided a remedy, but which would have gone unpunished under the more lenient provisions of the new law. I am not prepared to suggest any substitute for this enactment and its entire repeal would be mischievours. But

ill uses are undoubtedly made of it and prosecutions commenced with no other object than to procure payment of debts and demands by help of a machinery that was designed only for punishment. The course adopted on these occasions is to prefer the indictment, then to negotiate for a settlement and when the case is called on, the prosecution is withdrawn on some pretext more or less plausible.

Action of the court in such cases.

What in such circumstances should be the duty of the court, when satisfied that its procedure is being grossly abused for purposes of private advantage? The prosecutor chooses to inform the jury that he is not prepared to proceed with the case, being unable to prove it. The Judge has a shrewd suspicion of what has been going on. He is confident that in fact the defendant has satisfied the demands of his creditor and that the prosecution is dropped only because the object of it has been obtained. What should be done? Should the Judge acquiesce silently in this perversion of justice? Should he be content to complain merely, or should he act, and how?

To acquiesce silently is to sanction an abuse of the law he is administering, and what is really a contempt of the court over which he presides. He may protest against it to the jury when telling them that, no evidence being offered, they must find the defendant "not guilty."

Prosecutors to be called on his recognizances.

But may not another course be taken with good effect? If satisfied, on reading the depositions, that there is a case to go to the jury—that the charge in the indictment is a substantial one—that an offence alleged by the prosecutor has been really committed,—may he not with advantage cause the prosecutor to be called upon his recognizances "to appear and prosecute and give evidence." If then he fails to appear,

the recognizances should be estreated. If he appears, the Judge may insist upon the case proceeding. The witnesses may be called in like manner. If they appear, the Judge may examine them from the depositions and in fact the case may be tried out.

Settlement out of court.

It should be a rule in all Criminal Courts that the prosecutor who resorts to them should not be permitted to use them for any other purpose than that for which they are designed, namely, the punishment of offences against *public* law and order, not for reparation of private wrongs, real or imaginary. Therefore it should not be permitted to a prosecutor to withdraw from what is or ought to be his public duty, either for his convenience or, which is the common motive, for his *profit*. This rule has been recently emphatically expressed by the Judges of the Queen's Bench in relation to an abuse of the procedure by criminal information in charges of libel, which it had become a practice to employ for the purpose of enforcing a public apology. This is not to be permitted for the future. The party, say the Judges, who resorts to criminal process for libel shall proceed with it to its legitimate end. So it should be in the cases to which we are here referring and these remarks apply equally to the still greater abuses to which attention is next to be directed.

Allowed in assaults.

I refer to what has been termed "settlement out of court." In certain cases the law expressly permits this, as in charges of assault before Magistrates, doubtless on the assumption that, although in certain circumstances assaults amount to offences against the public, in many cases they savour more of private wrong. Judges and Magistrates may, therefore, in cases of this class prudently permit, or even advise, compensation being made to the injured party in

preference to punishment, which gives him nothing but his revenge. A careful examination of the facts of the case must of course be made before assenting to such an arrangement, to be assured that it is properly within the class rather of technical than of moral offences—of misbehaviours rather than of crimes —and of private rather than of public injuries. But, satisfied as to this, the sanction of the court may properly be given to a settlement come to by the parties. In such case the convenient practice is to require the defendant to plead "Guilty" to a common assault. If time is required to procure the agreed compensation, sentence should be deferred and if then it is stated by the prosecutor that he is satisfied, the defendant may be discharged on his own recognisances to come up for judgment when called upon.

Corrupt settlements.

But this is not the class of settlements out of court to which I refer. They relate to positive crimes, such as larceny, embezzlements and frauds. They are of most frequent occurrence in charges of embezzlement and in cases of fraud. The usual condition of the compromise is the return of the stolen property or some portion of it, or payment of its value, and in charges of embezzlement the payment by the prisoner or his friends of the sum embezzled. The manner of accomplishing the transaction is to offer no evidence for the prosecution, with an intimation that it was insufficient to secure a conviction. The assertion so made is often too hastily accepted by the court, an acquittal is taken, and the thief escapes punishment. But the Judge or Magistrate who has been so deceived once becomes wary thereafter. He will look with suspicion on all such proceedings. He will not assent to the proposed course without first carefully reading the depositions, to satisfy himself, that there

is really no case properly to be submitted to the jury.

Duty of the Judge.

Often he will find a very strong case indeed. Then his duty is plain. He will adopt the course above suggested, call the prosecutor and the witnesses and persist in the trial, or forfeiture of the recognisances of the prosecutor and the witnesses. In more than one instance I have successfully adopted this plan for preventing so grievous an abuse. Finding from the depositions that the evidence was strong, satisfied that there has been an irregular compromise, I have required the prosecuting counsel to proceed, or have myself called and examined the witnesses, and a conviction has more than once concluded a case which had been presented as one in which there was no evidence that could be offered to the Jury.

Intimidation of witnesses.

In Middlesex—and as I am informed by the learned Chairman, Mr. HARDMAN, in Surrey also—there is a growing practice of intimidating witnesses. Threats of vengeance are conveyed to them if they should venture into the witness box. If so many come to light, how many more must remain concealed? If we may judge by the number in which the threat fails of its effect, how many more may there not be in which it is successful, and justice thereby frustrated?

Committal for contempt.

The evil is formidable indeed; but the remedy is not so simple as it may appear. If the threat is uttered within the Court, it may be treated as a contempt and the offender imprisoned for the remainder of the sitting of the Court. But if it be spoken outside the Court, as for the most part it is, what remedy is there then? Only an indictment after committal by a Magistrate. The Judge has no jurisdiction to try and punish then and there—he can only rebuke and warn.

If this formidable offence should come before him in the form of an indictment, and there is a conviction, a punishment of exemplary severity should be inflicted—for there are few offences fraught with so much mischief to the public as the intimidation of witnesses striking, as it does, at the very root of the administration of justice.

CHAPTER XIX.

COSTS—COMPENSATION—RESTITUTION.

Forfeiture for Felonies' Act.

A GREAT improvement was wrought by the *Forfeiture for Felonies Act* (33 & 34 Vict. c. 23). Abolishing forfeiture, it provided in lieu of that barbarous process that on any trial for felony the Court might order the costs of the prosecution to be paid by the convict and compensation made to the prosecutor for any loss he may have sustained by reason of the crime, or any expenses he may have properly incurred in the prosecution of the criminal. Provisions are made for the enforcement of such an order.

The grievous defect in this excellent law is that it does not extend to misdemeanours — having been treated, I presume, by the Legislature as designed to be merely a substitute for the previous law of forfeiture, which did not extend to misdemeanours. On this some suggestions have been made in a former chapter.

The criminal law of France is more logical in this respect. Not only may compensation be applied for by the party injured and ordered by the Court in all cases, but it is made a part of the sentence. I am not informed by what process it is enforced and I presume that in the great majority of convictions it is practically worthless, for criminals rarely possess pro-

perty that could be taken. But the estimation of the damages by the Court serves to measure the amount of wrong done and so to indicate to some extent the principle that should govern the measure of the punishment.

Suggestion for award of damages.

Reflecting on this practice of our Continental neighbours, it has occurred to me if the punishment of theft, whether by larceny or by fraud, might not be more effectually measured by sentencing the thief to work out in prison a certain fixed portion of the value of the property taken from the prosecutor. The penalty would thus bear a known ratio to the crime, it would commend itself to the public mind by its manifest justice, and even in the mind of the criminal it would soon come to be associated with the crime, which undoubtedly is greatly encouraged by the present uncertainty of the amount of punishment the criminal will receive in case of detection. The first step to improvement is to remove from crime, so far as may be possible, the element of *chance*. If a certain known penalty certainly and immediately followed a crime, there would be no crimes for *gain*, but only crimes of *passion*. The nearer we can approach to this by increasing the chances of detection and the certainty of punishment, the more efficient will be the law for the repression of crime. I throw this out as a suggestion merely.

Uses of these provisions.

But these provisions do not appear to be made use of to the extent they might be. They are rarely enforced in practice. In my own experience only seven applications have been made to me for this purpose, so that I suspect they are not generally remembered. It will be necessary to make some inquiry as to the possession of tangible property by the convict. But if sufficient assurance can be had as

to this, the order should be made—the costs to be taxed by the officer of the Court, the compensation to be determined by the Judge, who, for that purpose will question the prosecutor as to the losses sustained, but form his own judgment as to the sum to be awarded. The process for recovering these amounts is prescribed by the statute and it is neither troublesome nor costly, and therefore the hesitation in the use of the provision is the more remarkable.

Restitution.

Restitution is more simple and obvious and daily demanded. The Court has possession of all the property produced and identified and can order its restoration to the owner. But a practical difficulty arises when there is a quantity of other property, undoubtedly stolen from the prosecutor, in the possession of pawnbrokers or others, but not laid in the indictment and not therefore in the possession of the Court. No order for its restitution can be made and the prosecutor is of necessity left to his civil remedy, unless he chooses to charge the prisoner in another indictment and so bring it into the jurisdiction.

But there is another case more difficult to be dealt with. The prisoner has been acquitted, although the property the subject of the charge is undoubtedly that of the prosecutor. The Court can do nothing to help him to his own. The prisoner is not likely to do anything for its retention. In such case, the Constable who holds the property asks what he is to do with it? The Judge can do no more than say, "Keep it until it is claimed and if the prosecutor claims it require his guarantee against consequences."

Where money or valuables are found upon the prisoner, application is often made for an order that some part may be given up to him for the purpose of

his defence. It is necessary, before acceding to this, to ascertain that such property is no part of the alleged stolen property or of its proceeds, and the prosecutor should always be asked if he has any objection to such an order being made.

CHAPTER XX.

JURIES AND VERDICTS.

Juries in civil cases.

I HAVE no superstitious veneration for Trial by Jury nor for the particular form of it that has been established in this country. In civil cases, where conflicting claims are in issue and for the most part the question is not to be answered simply by "Aye" or "Nay," but by a nice balance of mutual rights and duties requiring more than common sagacity to adjust, a Jury is probably as bad a tribunal as could be constructed. But it is made ludicrously incompetent by requiring twelve minds to be unanimous on a matter about which there is so much doubt that two qualified lawyers form differing opinions. No civil action is brought or defended unless each party has at least a show of right on his side and there is something not only to be said but to be considered on his behalf. To expect that in a case where sagacious lawyers have so differed in their views of it as to advise the incurring of great cost in support of them, twelve men could be found truly and honestly to be of the same mind on the presentation of these conflicting facts and inferences, is an absurdity to which only custom could have reconciled us. In fact, *actual* unanimity *is* very rarely attained. The apparent agreement that issues in a verdict is brought about by various contrivances, familiar to those who have served

on Juries in Civil Courts. Some compliant minds concede their own opinions to others more firm. Some prevail merely by threatening to "stand out." Damages are frequently determined by lot, or by striking an average, each juryman naming his sum and the foreman dividing the whole by twelve—a plan not in itself unfair if fairly done; but the justice of which is defeated by those who incline to either party exaggerating or diminishing their figures, as the case may be. This is the explanation of the seemingly unaccountable verdicts which so often surprise the reader ignorant of the method of calculation by which figures so strange and unmeaning have been arrived at. The unanimity in appearance, which is only a sham in reality, ought to be abolished and the fact recognized by the formal acceptance of the verdict of a majority, changing for that purpose the traditional number which might well be reduced to *seven*.

Advantage of juries in criminal cases.

But it is otherwise in Criminal Cases. The number may be arbitrary, but the requirement of unanimity, so irrational in civil cases, on criminal trials is an admirable contrivance. Twelve being the complement of such a jury from time immemorial, it would be a needless disturbance of a prejudice to change the number. But the reason why absolute unanimity is so undesirable in civil cases and so desirable in criminal trials is that in criminal cases there is but one question to be determined by the jury, "Is the prisoner proved to your satisfaction to be guilty? If not so proved you will acquit him." In a civil case a considerable number of questions are raised involving opposite rights, claims, and interests, which cannot be answered by a mere "Yes" or "No," but must be weighed against one another and the verdict should

represent the balance of the account. In few civil cases—in a section of *torts* alone—would it be possible to apply the admirable rule recognised in criminal cases—give the defendant the benefit of the doubt. A civil case is of necessity all doubt or it would not be contested. There is good sense as well as humanity in the principle that governs our criminal law—that it is for the prosecution to prove the prisoner to be guilty and not for the prisoner to prove his innocence. For my own part, I should be very sorry to see this principle departed from and the Continental practice adopted of assuming guilt until innocence is proved —a practice that would, I am confident, speedily be found to prevail, if prisoners were admitted to the witness box as witnesses for themselves.

Experience wholly in their favour.

Therefore it is that, although much doubting the fitness of juries in civil actions, we may approve them altogether in Criminal trials. Indeed, experience will but increase the respect every Judge who has presided in criminal courts must feel for this institution. Looking back upon the long acquaintance I have had with Juries, I am surprised to find how few are the cases in which I have differed from their verdicts and how often, although entertaining some dissent at the moment, I have been satisfied, after reflection upon the whole case, that they were substantially right. I could fill many pages with a summary of the merits of this tribunal—the mighty shield provided for personal liberty by the requirement that twelve independent minds shall agree that a man is proved to be guilty of a crime before he shall lose his liberty or his reputation ;—the advantage to the Judge of being compelled by the duty of summing up to master the whole case and apprehend distinctly the points at issue that he may clearly submit them to the Jury.

Not the least advantage to the Judge is the relief from responsibility, overwhelming to a reflecting mind, conscious that upon his sole judgment the liberty and reputation of another man depends, but which is by this institution remitted from him to the judgment of twelve other men, *all* of whom must be satisfied of guilt before the accused can be convicted.

Recommendations by the jury.

Seeing, therefore, how great assistance is the Jury in the administration of criminal justice, the Judge is bound to receive their suggestions with the utmost respect and to comply with them so far as duty will permit.

The province of the Judge is to interpret the law, to assist the Jury by presenting to them the facts marshalled as they bear upon the question to be determined and to measure the punishment. The province of the Jury is to determine what facts are proved and to form and pronounce a judgment on those facts. It has been questioned if the Jury are not trespassing beyond their proper province when they recommend to mercy, which means a mitigation of the punishment. In France, an equivalent verdict is that of "guilty with extenuating circumstances." The practice is as old as trial by jury and has become a recognised part of the procedure in criminal trials. But it may command approval on its own merits. It is vastly for the interests of justice that the relationship between the Judge and Jury should be of a very cordial nature. The sagacious Judge will endeavour to establish with his Jury that mental sympathy for which our language has no equivalent term, but which the French express by the word *rapport*. The advantage of this sympathy is especially found in the work of summing up. A practised spectator will observe in a moment, from the tone of the Judge and from his manner of dealing with

his subject and the respect and attention with which the Jury listen to him, if this relationship has been established. The Judge is, or ought always to be, what a celebrated Advocate boasted that he made himself—the thirteenth juryman. The Jury thus come to feel themselves a part of the Court and their interest in the work does not end with the delivery of the verdict. They think what the sentence ought to be—what it would be if it rested with them,—and they look eagerly for the decision of the Judge and listen attentively to the remarks he makes in passing sentence and in their minds approve or disapprove. Probably their views of it are widely spread about afterwards and are a material element in that public opinion which has so steadily supported the administration of the criminal law, the general fairness of which has never been impeached even by the classes most subject to it.

Recommendations to mercy.

But although the recommendation of the Jury should always be received with respect and gravely considered, it is not always to be accepted in practice. It is a good rule to ask for the ground of the recommendation. In fact, not unfrequently, it is nothing more than a ready means of bringing about unanimity. Some two or three jurymen have doubts, or, more properly, are reluctant to convict, not because they question the guilt of the prisoner but because some soft place in their hearts makes them unwilling to punish. A recommendation to mercy satisfies the kindly emotion and the others assent, but without any such desire on their own parts. The question by the Judge, "On what grounds, gentlemen?" perplexes them and some utterly insufficient answer is usually advanced. So likewise it is when the Jury recommend to mercy in ignorance of facts known to

the judge as to the antecedents of the convict. I have seen cases in which the prisoner so recommended is afterwards shown to have been several times convicted previously. In all such and similar cases the Judge will not give effect to the desire of the Jury. But whenever there is no substantial reason for its rejection, it will be the prudent and proper course to act upon it, even if no good reason for it be apparent. Something is due to the opinion of a sensible Jury who have viewed and weighed the case as attentively as the Judge. Even if it serves no other purpose, it links the Jury more closely with the whole business that is passing and enlists all their sympathies. Not the least advantage is the confidence it gives them in the Judge. If a Jury is compassionate and fears a severe sentence, it is apt to acquit even against evidence, seizing upon any excuse for doing so which the ingenuity of Counsel may suggest. But if it knows that the Judge receives and acts upon its recommendation, it comes to feel that thus to some extent it regulates the sentence and the verdict is as it should be.

When it is so acted upon, it should always be stated in passing sentence that but for this recommendation the punishment would have been by so much the greater.

Where verdict against evidence.

Where, in the judgment of the Judge, the verdict is not justified by the evidence, it is entirely within his province to request the Jury to reconsider it and, if he deems it desirable, to point out to them the facts and the conclusions reasonably to be drawn from the evidence. A miscarriage of justice is not infrequent from some misconception of evidence or illogical deduction which a few words suffice to dissipate.

The eloquent exhortations of counsel as to the duty of

a Jury to acquit if there be a shadow of doubt in their minds is often accepted by them as an assumption that such a doubt exists. It has been found a desirable practice for the Judge to anticipate such a misunderstanding by concluding his summing up with an explanation of what is intended when it is said that the benefit of the doubt shall be given to the prisoner. It may be put to them somewhat in this form: "Gentlemen, you have been told, and truly, that the benefit of the doubt is to be given to the prisoner. But I desire to explain to you once for all what this maxim, which you will have continually urged upon you on the part of prisoners, really means. You are not to understand by it any vague suggestion that may be offered by the ingenuity of Counsel or suggested by your own minds, whether this or that secondary matter is unexplained or contradicted. The benefit of the doubt, construed according to common sense, means this—and nothing more than this—that if, upon reviewing the whole case, you cannot make up your minds about it—having weighed the facts and arguments on both sides you are unable to arrive at a conclusion satisfactory to yourselves whether the prisoner is guilty or innocent—if the scales are equally balanced—that is the doubt, and the only doubt, the law contemplates giving to the prisoner the benefit of. It merely means that the scales being even you are to turn them in favour of the prisoner." If an early opportunity at the Assizes or Sessions be taken to impress this upon the Jury, it will save much subsequent trouble and prevent some erroneous verdicts.

The benefit of the doubt.

Explanation of the jury.

A conviction, where the Judge is strongly of opinion there should have been an acquittal, is, of course, very rare, for the summing up in such a case could scarcely have failed to show what was the view entertained of

Conviction against evidence.

the case by the Judge. But it is not unknown to any extensive experience. I have met with some half-a-dozen instances. Where the request to reconsider the verdict has failed, which is still more rare, the course adopted has been to discharge the prisoner on recognizances. In a case where this incident had occurred, I was curious to learn the causes of it, and was informed that the prisoner had been known to two of the jurymen as an inveterate thief in their neighbourhood and therefore they had no doubt as to his guilt, although there was no proof of it.

Perverse acquittals. Perverse acquittals are much more frequent. A case is proved up to the hilt—the prisoner has even admitted his guilt—there has not been so much as the show of a defence,—and yet the whole Court is amazed to hear a verdict of "Not Guilty." Asked to reconsider it, the Jury lay their heads again together, but with the same result. The cause of such a not uncommon miscarriage of justice is usually the presence of a friend upon the jury; but sometimes, I regret to say, it is the presence merely of a fellow feeling. The proper course in such a contingency is to call a new jury at once and state the reason for so doing.

Troublesome juries. Occasionally the Judge has to deal with a troublesome jury. Some one or two persons are upon it who pride themselves on their acumen as amateur lawyers and who probably reign at their clubs as critics of the evidence and verdicts in the trials reported in the newspapers. Such men distinguish themselves in the jury box by putting a number of questions to the witnesses, taking elaborate notes, showing their skill in the detection of difficulties that escape the notice even of the defendant's counsel. Much of this over-zeal may be checked by requesting

that the questions may be put through the Judge. But if withal they continue irrepressible, the prudent course will be, not to give offence by excluding them at once, but on the adjournment, or at the close of the day, require a new jury to be quietly called.

Desirable to continue the same jury.

It is desirable to continue the same jury from day to day. For the most part they have to learn their business and a great deal of labour and valuable time are saved to the Court by the absence of repetition of instructions which are unavoidable when a new jury appears. Doubtless others have noticed that the three or four trials with which the business begins are often unsatisfactory. There is an inclination to acquit upon trifling grounds and to give undue weight to the stock fallacies of counsel. A little practice suffices to remove this tendency when experience has made them more wary. Therefore it is desirable to initiate the jury into the work of the week by taking some of the more simple cases at the commencement of the business—to avoid, if possible, submitting to them any case of length, doubt, difficulty, or importance, until they have gained some experience.

I am within bounds when I say that the chance of an acquittal is fivefold greater if the trial of a complicated case be the *first* than if it were the *last* of the labours of the Court.

CHAPTER XXI.

SUMMARY CONVICTIONS.

Of the suggestions contained in the preceding chapters the greater part are applicable to Summary Convictions and therefore need not to be repeated here. I propose to add a few hints on matters that come within the summary jurisdiction of Magistrates.

Offences criminal or *quasi* criminal.

The greater portion of *Summary Convictions* are for offences criminal or *quasi*-criminal. They involve *penalties* which, although for the greater part pecuniary in form, may prove in fact to involve imprisonment. The Superior Courts have recognised this criminal character of offences punishable on summary conviction by pecuniary penalty or imprisonment, by holding the defendants in such cases to be within the exception of the Evidence Act and therefore incompetent to be witnesses on their own behalf.

To be tried according to the rules of the Criminal Law.

The importance of a clear understanding by the Magistrate of this characteristic of an offence summarily punishable by pecuniary penalty or imprisonment lies in the recollection it should ever bring to his mind, when exercising this summary jurisdiction, that the case should be treated in all respects as criminal and the same rules in the construction of the law and in its application and the same strict principles of evidence applied to it as a Judge would observe in the trial of a murder in a Criminal Court. It would,

indeed, be monstrous if a Magistrate were to try more laxly a case in which he has power to imprison for three months than does a Superior Court when trying a case in which the utmost punishment awarded would be imprisonment for a month.

The Procedure.

Jervis's Act has prescribed a strict form of procedure in all Summary Convictions and this should be strictly observed. The complaint should be read. The defendant is to be called upon to plead. The witnesses for the prosecution are to be examined and cross-examined by the prisoner's solicitor, or if he is undefended and there is need for it, by the Magistrate. Then he must be asked if he desires to call witnesses and all of these must be fully and patiently heard, as well as whatever the defendant may desire to urge on his own behalf, or his Counsel or Solicitor to say for him. The principle rules in the administration of the Criminal Law, which it behoves the Magistrate to keep ever before him on the hearing and in his decision of the case, may be briefly stated thus:

Prosecution to prove the charge.

1. It is for the prosecution to prove the charge and not for the defendant to prove his innocence. If proper proof by the prosecution fails the charge must be dismissed, whatever the opinion of the Magistrate as the *truth* of the charge.

2. The question for the Magistrate is not whether in his own mind he believes the defendant to be guilty, but whether he has been *proved by proper and sufficient evidence* to be guilty. The defendant in such a case is to be tried precisely as by a jury and as a jury is sworn to try him, and this cannot be more clearly and tersely put than in the language of the Juryman's oath, "You shall well and truly try and true deliverance make, &c., and a true verdict give *according to the evidence.*" The Magistrate, exercising his

extensive summary jurisdiction should never forget that he is Juryman as well as Judge and should feel and act as if he had taken the Juryman's oath.

Law to be construed in favour of the defendant.

3. The law must be construed strictly *in favour of the defendant.* If its language be capable of two constructions, that must be adopted which is most in favour of the defendant, the law being presumed not to create new crimes. The language of a law must never be strained so as to make an offence, nor with a view to bring the defendant within its grasp in order to punish him for doing what the Magistrate deems to be wrong in itself, or something *he* thinks it desirable to suppress. This caution is not unnecessary, for an inclination is not unfrequently exhibited by Magistrates to stretch a statute for the purpose of punishing, and by example repressing, some real or supposed mischief—in fact, as they think, "to do a great right do a little wrong." Instances of this are not unknown even among the occupants of the higher Magisterial Offices. But it is a practice so fraught with danger that the Magistrate cannot too sedulously guard himself against it, remembering that his business is to administer *the law* as it is and not to dispense *justice,* as in his own mind *he* believes it ought to be.

Defendant entitled to benefit of the doubt.

4. A reasonable doubt whether the proof is sufficient should always turn the scale for an acquittal. If the mind of the Magistrate is left in doubt, it can only be because the prosecution has failed to prove the charge, as it is bound to do.

5. If the conduct of the defendant is capable of two reasonable constructions, one of which is consistent with innocence, that construction is to be adopted.

6. The strict rules of evidence are to be observed

Strict rules of evidence to be observed.

precisely as in a Criminal Court. Hearsay is to be rejected. What one defendant says in the absence of a co-defendant is not to be received as evidence against him. The wife cannot be a witness for or against her husband, although in assaults and some other cases more truly civil than criminal both prosecutor and his wife are admissible against the defendant.

Strict proof to be required.

7. As the defendant is not admissible as a witness on his own behalf, the utmost care is required to be sure that as little wrong as may be shall arise from this disadvantage. If the charge depends on the evidence of the prosecutor alone, or of the prosecutor and a friend, or even of several friends, and the defendant was alone with them and no person present who could give evidence on his behalf, the Magistrate should not convict, unless the evidence establishes the case beyond the shadow of a doubt. If the prosecutor fails to prove any material point, or if he contradicts himself in any manner, or if his story is not perfectly consistent, the fact that the defendant is at his mercy should secure for him an acquittal.

Punishment.

In awarding *punishment* on Summary Conviction, the Magistrate should be guided by all the considerations which in the preceding chapters have been suggested, so far as they may be appropriate to the particular case. But there are a few cases, coming specially within the jurisdiction of Magistrates, which deserve distinct notice.

As the rule, fines should bepreferred to imprisonment and always in the case of first offenders, with the exception, perhaps, of cases stamped with cruelty and brutality. For such cases a money penalty is neither appropriate nor sufficient. I include in this category *brutal* assaults—especially on police officers—and bad

cases of cruelty to animals. These may be worthily punished by imprisonment in the first instance.

Assaults on police officers.

So likewise may be assaults upon constables, bailiffs, and other officers of justice in the execution of their duty, especially when made in attempts at *rescue*. It is essential to the security of society that they to whom the execution of the law is entrusted should be protected in the performance of their difficult and often dangerous duties by the full power of the law.

Common assaults.

But ordinary *assaults*, such as are the great majority of those brought before Magistrates' Courts, should be treated with comparative leniency after inquiry into the nature of the provocation and the extent of injury done. Not a few of these charges partake more of the character of civil wrongs than of offences really criminal. For the most part they come out of passing quarrels that lead to blows, in which one party is usually as blameable as the other, only he who chances to get the worst of it is commonly the first to avenge himself by taking out a summons. Sometimes, indeed, there is a positive race between the parties for the advantage of making the first complaint, knowing that he who chances to be the prosecutor prevents his adversary from giving his own account of the affair while himself is heard, thus having him at his mercy. But for the happy invention of a cross summons, in which this position is reversed and the parties change places, the one silenced and the other heard, the greatest injustice would result.

Cross-summonses.

The Magistrate should reserve his decision until he has heard both summonses. But he cannot, without the consent of both parties, treat both as one case with one hearing. He is bound to go through the same process of trial with both summonses, hearing the

witnesses on both sides, even although this may impose upon him the tediousness of a twice-told tale. But it will be enough if, on the hearing of the second summons, he puts to the witnesses who have been already examined just enough of question to make out a *primâ facie* case, provided that he is careful to examine the now complainant upon all the facts upon which his mouth was closed in the previous case where he had been the defendant. Thus with the least loss of time he will obtain all the facts of the case as asserted on both sides and will be in a position to decide both at once, for practically they resolve themselves into one case.

To prevent this tedious process, Magistrates should be empowered to consolidate summonses arising out of the same subject matter.

Amicable settlement.

The law itself has recognised the civil character of assaults generally by permitting the Magistrate so to treat them and, instead of proceeding to judgment and punishment, to permit the parties to retire and settle their quarrel out of court. It is often advisable to recommend this course. Many a feud is reconciled by a judicious Magistrate who, in friendly tone, as an adviser not as a Judge, recommends the angry disputants to shake hands then and there and depart the court as friends. But if they will persist, despite all intervention, in "having the law" of each other, the case usually resolves itself into the question, who struck the first blow? Each party is found to swear that he (or she) never lifted a hand nor uttered an angry word, but submitted with unresisting patience to the blows and abuse of the other. The evidence of the parties or of their partisans in charges of assault is of very little value and the Magistrate must rely upon independent witnesses, if

Proof in assault cases very difficult.

such there be, for eliciting the truth. Failing these, the wisest course is to dismiss both charges. If, however, the case is clear, the penalty should be slight, unless the facts present some features of special aggravation. An appropriate conclusion of these cross charges of assault is often found in binding both parties to keep the peace to each other.

Juvenile offenders

Juvenile Offenders are the most perplexing to the Magistrate—how to deal with them in the present defective state of the law. The subject has been fully treated of in a former chapter and to that the reader is referred. But inasmuch as a boy cannot be sent to an Industrial School after conviction, nor to a Reformatory without conviction, some consideration should be given to the question which course is the most desirable. The difference does not lie in the discipline of the two classes of schools, for these are very much alike and indeed are now practically assimilated, but in the effect upon the boy's future life, if he comes from one or the other, the ill reputation of the reformatory abiding with him ever after. Another matter to be considered is the character of his associates at a reformatory. When, therefore, the boy is rather a "wastral" than a wicked boy, I would suggest the propriety of refraining from conviction, even for larceny, and sending him at once to an Industrial School.

And more so in the case of a girl.

Depredations on unprotected property.

Depredations on unprotected property are often the source of some perplexity how to deal with them. These range from simple trespass to positive destruction of valuable productions, as trees, shrubs, plants, hedges, and such like—where the measure of damage is greatly in excess of the selling value of the things destroyed by reason of the long time

required to replace them and the injury that may result indirectly, as from straying cattle. In these and the like cases, not amounting to larceny but coming within the "Malicious Injuries to Property Act," the punishment is the damage actually done and a penalty within a prescribed amount. The damage is generally easy of assessment; but consideration is required in determining the *penalty*. What is the measure of wrong? It cannot be resolved by measurement of the damage. The Magistrate should take into consideration all the attendant circumstances. Was it a first offence? Was the defendant upon the premises for the purpose of committing the spoil, or was he there for some proper purpose? Was he moved to it by malice, was it a deliberate intent to commit the injury, or was it mere wantonness? Thus viewed, the offence may range from the slightest to a very high degree of criminality and the penalty should be regulated accordingly, ranging from a shilling to the full amount of penalty permitted by the law.

Stealing fruit and vegetables.

Stealing of fruit and vegetables, without reference to the mere legal distinctions as to their severance, are frequent subjects of complaint in Magistrates' Courts. When this is the work of unruly boys, whipping would be the proper punishment. But as this is not permitted nothing remains but a fine or a prison. The fine should first be tried. If that fails then, but reluctantly, the gaol. Men are entitled to no such leniency. Their offence must be deliberate and with knowledge that it is an offence. But it may vary much in its criminality according to the more or less of contrivance exercised; as, if access to the property had been by merely trespassing from a path in an open field, or if effected by entering an inclosure,

climbing over a wall or otherwise. Something may be gathered from the nature of the property, as if a turnip or fruit—potatoes or peaches—a sapling in a hedge or a flower in a garden—the amount of mischief done to the owner as compared with the advantage to the depredator being also a proper item in estimating the penalty.

Highway offences.

Another large class of cases coming before Magistrates is that of *Highway Offences*—such as riding in a cart without reins, or being asleep and having no control of the horses, permitting cattle to stray, obstructions of various kinds and accidents from not observing the rules of the road. In such cases it is desirable to be very lenient to a first offence, inflicting merely a nominal penalty, but increasing the penalty with each subsequent offence. It is a wholesome as well as a convenient rule, readily understood by the offenders, to *double* the penalty on each conviction after the first, but on each occasion informing the culprit that such will be the consequence if he appears again on a like complaint.

Cattle straying on highways.

The charge of permitting *cattle to stray on the Highway* is often attended with this difficulty—the defendant answers that it was no fault of his, they had made their exit from the field where they had been feeding, through a fence or a gate left open by others, unknown to himself. True. But he is bound to keep proper fences and to lock his gates if they cannot otherwise be fastened. Yet farmers *are* liable to these mishaps, and although the excuse is insufficient in law, if satisfied that it is a *bonâ fide* excuse, a merely nominal penalty will suffice. But great vigilance is necessary to be assured of this and that the true purpose was not to give the straying cattle a feed in the public way. One important inquiry

should never be omitted. The police should be asked if they had found cattle of the defendant habitually straying? If so it be, as also in cases where the offence is clearly shown to be wilful, the full penalty, which is very trifling, should be imposed.

Drunkenness.

Drunkenness and its allied offences claim unfortunately a considerable portion of the attention of the Magistrate and much difference of opinion and of practice prevails in the method of dealing with them. We can venture only the suggestions of some experience. The law has recently been changed and the power of the magistrate to deal with such cases considerably extended. It is desirable to establish some rule as to punishment of the different degrees of this offence, which may be estimated thus:

Degree of culpability.

(1) When a man is *tipsy*, but neither incapable nor disorderly, the police should make him go home quietly, without more. If he is brought before the Magistrate to be dealt with, in such case a nominal penalty will suffice, unless he is an old offender in this respect. Then the penalty should be greater, with an increase on each occasion, if frequently repeated, until the limit is reached.

Being drunk and incapable.

(2) When the charge is of being *drunk and incapable* and the offender has been taken into custody and so kept until the hearing, the punishment should be taken into account and a discharge with a reprimand will suffice for a first offence. A penalty should be added for subsequent offences. But if he was bailed, a penalty something more than nominal must be inflicted. Usually, it is the old fine of 5*s*.

Being drunk and disorderly.

(3) If, however, the charge be of having been *drunk and disorderly*—an inquiry must be made into the nature of that alleged disturbance of the peace—if it was merely being noisy—if foul language was

used—if there was resistance, or a show of violence. The penalty in such cases will be increased according to the special circumstances of aggravation—so much for being drunk, and so much more for causing a disturbance and being a nuisance when drunk.

Offences by innkeepers.

Offences by *Innkeepers* are often an important item in the work of Petty Sessions and there is a difficulty in dealing with them by reason of the uncertainty sometimes existing whether the offence was with the knowledge and consent of the defendant. For although the law rightly holds the licensed publican responsible for the proper conduct of his house, the Magistrate cannot but take into account circumstances that go far to exempt him from moral responsibility—as in the not infrequent case of negligence by his servants in his absence. Such a defence cannot be admitted as a ground for *acquittal*. It is absolutely necessary to hold the Innkeeper to his legal liability for any misconduct in his establishment. But if the Magistrate is satisfied that it was more his misfortune than his fault, he should indicate such opinion by a very mitigated penalty.

Differences in culpability.

Where the offence is flagrant, the penalty should be proportioned to its character—for although not so distinguished by the law, the Magistrate cannot but recognise the fact that some prohibited acts are very venial and others very mischievous—such, for instance, as permitting gambling, harbouring thieves and prostitutes, keeping the house open during prohibited hours. These are offences a landlord must be presumed to know and for which he is justly responsible. But even some of these may be so far excused that for the first offence the penalty may be fairly mitigated. The question whether and in what cases the conviction should be indorsed upon the licence is more important;

for that is a proceeding of possible serious consequences to the offender. The reasonable rule may be, not to indorse for a first offence, unless it be an exceptionally bad one. But the rule should also be to take this course with a second offence, unless there be some special circumstances calling for its exception.

Removal of nuisances.

The most troublesome and perplexing of the cases that come under the jurisdiction of Magistrates in petty sessions are those arising out of the Sanitary Laws and especially the *Removal of Nuisances*. Applications are made for orders to abate a nuisance proved to exist on the premises of B. B. says, "It is not of my making—C. has a right of drainage into my land—the ditch is common to both of us. I have no right to drain into the adjoining land belonging to my neighbour D. If I obey your order and send the nuisance on to him, he will have an injunction or bring an action against me. What am I to do?" Here is a problem certainly. But it is not the province of the Magistrate to solve it. His duty is simply to order the nuisance to be abated and B. must discover the means. At the expiration of the order B. is again summoned for the penalty for non-obedience to it.

Perplexities.

Now comes the perplexity of the Magistrate. He feels it to be unjust to punish B. for not doing what it is impossible for him to do and yet the law is imperative. "You must cover up your drain." "I have done so, but the contents must have an exit." "Make a cesspool." "But a cesspool will overflow in two days and the nuisance will remain as before." This brief dialogue represents the difficulties that impede the enforcement of the law. In such case can the Magistrate justly exact the penalty the law has imposed? I think not.

Order to abate.

But if a nuisance is capable of being removed, the

Magistrate cannot consider the cost of the operation or its hardship upon the defendant. He must make the order and compel obedience to it by inflicting the penalty for neglect. Nevertheless in all cases a statute so severe and imposing such onerous duties upon individuals should be administered with the utmost consideration for those who are subjected to it; ample time should be allowed for the execution of any order made and severe penalties should be exacted only in cases of wilful and persistent disobedience.

Closing houses unfit for habitation.

Still more grave is the duty of the Magistrate when, under the law, he is asked to order a house to be closed or pulled down as being uninhabitable. He hears the evidence of the Medical Officer and Inspector. According to them, the building is out of repair, ill-roofed, with rotten timbers, and uncleansed. The rooms are crowded with thrice as many inmates as is permitted by the legal allowance of cubic feet of air per person. He is asked for an order to close the house within a limited time. He feels it to be a formidable power to exercise over the property of other men and he will hear what is to be said by the owner who is so to be treated. His answer probably is that the house is let to a tenant or tenants, who will not turn out. He has no legal power to turn them out and he cannot control them while in possession. The tenant may let the privilege of a bed to as many permanent lodgers as can crowd into the room. Only if it is a common lodging-house can the law control them. It would be cruel to turn a houseful of half-naked wretches into the streets and highways. They must herd somewhere. They cannot afford the luxury of a good house which demands a great rent. The remedy is worse than the disease. But the Sanitary Authority insists that, according to

the rules of Sanitary Science, the house is unfit for human habitation and the order must be made at all hazards. If so required, it should be very tenderly enforced. Ample time should be allowed to clear out. The Magistrates should have "a view," and satisfy themselves, by personal inspection, that the building is incapable of being repaired, before they resort to the extreme remedy of an order to demolish it.

Revenue prosecutions—Assessed Taxes.

Revenue Prosecutions are a new and fertile province, within the jurisdiction of Magistrates, now that the Assessed Taxes are tranferred to the Excise and Licences substituted for Assessments—unquestionably a very great improvement in tax-gathering, but which has imposed upon the Magistrates much additional labour. To keep the taxable article without a licence is to incur a serious penalty. The power to mitigate such penalties is limited to three-fourths, so that for keeping a carriage without a licence the least penalty that can be imposed is 5*l.*, and for keeping a dog 25*s.* These cases require some consideration. They who, with myself, were Commissioners of Taxes when these questions of liability were raised in another form will understand me when I refer to the extraordinary difficulty in arriving at the truth from the evidence of parties appealing and upon whom was then cast the burden of proving their non-liability or exemption. The proof now is upon the officials laying the information that such a taxable article was kept. Being a penalty and therefore, according to the unfortunate construction of the Evidence Act, *quasi* criminal, the defendant cannot be a sworn witness on his own behalf. But the Magistrates will properly hear what he has to say, giving to his statements such weight as they deserve. If satisfied that he must be convicted, there will remain the question as to the

penalty. In this they will be guided by the answer to one question, "Was it a deliberate endeavour to evade the law, or merely undesigned negligence?" If the former, at least half of the full penalty should be inflicted. If the latter, it should be reduced to the lowest permitted amount (viz., one-fourth). And this may be further reduced in practice by a recommendation from the Bench to the Board of Inland Revenue, which the Excise Officer conducting the prosecution is always ready to report.

Excise and customs prosecutions.

Excise and Customs Prosecutions are now comparatively rare. When they occur they are always for serious offences. If accompanied with the usual circumstances of fraudulent evasion of the duty, the wholesome practice is for the Magistrates to impose the full penalty, leaving its mitigation to the Board of Inland Revenue on the application of the defendant. It should be remembered that in all such cases large profits have been made by evasion of the duty and that unless the penalty be large it would be profitable to continue to defy the law.

Offences against the Game Laws.

Game Offences require cautious treatment. They are the favourite theme of penny-a-liners and leader writers. The Magistrate must free himself from fear of either and try the case as if it had been an ordinary charge. Otherwise, it is an offence that varies much in its degree of criminality, ranging from little more than a mere trespass to what is really robbery too often lapsing into manslaughter or murder. Hence the Magistrate should endeavour to establish in his own practice something like a scale of punishment, regulated according to the varying characters of the offences coming into this category. The least is the simple trespass in pursuit of game, with a gun, a dog, or both, in open fields, in the

daytime. If a first offence, this should be treated very leniently, by way of warning, a penalty of 10*s*. and costs being sufficient where there was no circumstance of aggravation. A second and future repetition of this offence should be treated by *doubling* the penalty last imposed up to the limit allowed by the statute, and when that is exhausted, and *not until then*, imprisonment should be resorted to.

Circumstances of aggravation.

But if there be the additional feature of privacy and evasion, or the employment of any net, or engine, or any irregular contrivances to accomplish the object, the first offence should be punished by a larger penalty, with an intimation that a repetition of it will be treated as a case for imprisonment without a fine.

Game offences on Sundays.

Where any of these offences are committed on Sunday, as the law imposes a double penalty in such a case, by reason of the impossibility of protecting such property at the time when it is most subject to depredations, that rule should be observed and double the penalty inflicted that would have been imposed for the like offence on another day.

If these offences are complicated with other incidents of lawlessness, danger or alarm, such as night poaching—especially if the robbers are armed—assaults on keepers or constables, and such like, they are not cases for fine, but for imprisonment in the first instance, or if they cannot be adequately punished by the Magistrates, they should be sent to the Sessions or Assizes.

Weights and measures.

No jurisdiction of Magistrates is more usefully exercised than over *Weights and Measures*. But certainly this has appeared to me to be an offence which, as the rule, is not adequately punished. The sufferers by this form of fraud are for the most part persons who can least protect themselves. The

victims are the poor, who are compelled by their necessities to purchase only in small quantities. The deficient weight — the loaded scale — the curtailed measure—are usually found among the lesser of those articles, and therefore are not readily to be detected, but the fraudulent profits of which are to be computed, not by the dishonest gain on each sale, but by the sum of profit accruing from a multiplication of sales. The rich man buys his tea by the pound and a few pennyweights short of that inflict no perceptible loss upon him. The poor man buys his tea in ounces, and the deficiency of two or three pennyweights in each of his ounces is a serious abstraction from the sum of his purchases and brings a large aggregate of dishonest gains to the seller.

In apportioning the penalties for this offence it would be desirable to adopt some more definite rule, which I venture to suggest to my brother Magistrates.

The penalty should, so far as the very imperfect and insufficient law will permit, be proportioned to the probable gains realised by the fraud. We are apt to forget, in dealing with these charges, that great profits have in all probability accrued to the defendant from his dishonesty, or even from his negligence if such it is said to be. Inspection takes place only at long intervals and detection has doubtless come after months and even years of unholy gain. If the penalty be small, it will pay him to repeat the practice. He can afford to be fined once a year. If, for instance, by permitting his weights to rust a grocer gains but five per cent. upon every article sold with use of them, (and that is far below the average of deficiency actually found) is it not a mockery of justice to mulct him in a penalty of 20*s*. as a punishment for having pocketed 20*l*.? The

Penalty.

principle of punishment in such case should be to mulct him in such a sum that it shall not *pay* to repeat the fraud, and in this form to make him disgorge as much as possible of his plunder. Unfortunately the law does not give to the Magistrates the power to carry out this righteous principle of punishment. It most unduly limits the penalty to a sum wholly inadequate to the offence. Amendment in this respect is much required. An improved law would adopt the excellent scheme of the Act relating to malicious injury. The punishment should be a penalty calculated as nearly as may be by the probable profits that have been reaped by the wrong, with an addition by way of punishment for the offence. Until such a reform is made, the Magistrates can do no more than inflict the highest penalty where deliberate fraud is proved or where the gains have been long continued. Such an offence as loading the scales with concealed metal, &c., should invariably be visited with the highest penalty. Even in a case of negligence, if profit has been actually made by it, the fine should not be nominal, but such as would to some extent convert the profit into a loss.

Adulteration.

Adulteration belongs to the same category of offences, although of recent introduction to Magistrates' courts. The consequences of conviction for the offence are so serious and the proof is often so difficult that special attention requires to be given to all such charges, to be assured that they are established completely. If there be any doubt as to the fact of adulteration or as to its quality, the charge should be dismissed. If, however, the proof is perfect, the penalty should be carefully considered, so as to be properly proportioned to the character of the particular offence. Adulterations may range in degree of

criminality from being almost venial to being great public wrongs and the penalty should be measured accordingly. The first question will be, if the fact of the adulteration was known to the defendant and the sale deliberately sanctioned by him? Then there is the further question, what was the nature of the adulteration, whether noxious or otherwise? And, lastly, if it be a first conviction? If so, the usual rule of leniency to first offenders should be shown in this as in other case.s

The Vagrant Act.

Another large class of offences comes to the Magistrate under that comprehensive statute *the Vagrant Act.* The name of this very questionable law defines its objects. It was designed for the suppression of vagrancy in the strict sense of that term—wandering about the country with no known place of abode—and to suppress the offences commonly committed by persons of this class, known as *vagrants*, who have no regular employ but live by the exercise of their wits, supplemented by the use of their "pickers and stealers." Gipsies were the special objects aimed at by the statute and hence the provisions against *fortune-telling* by palmistry and otherwise which was their special calling. But it comprehends, also, those vagrants who run away leaving their wives and families "upon the parish." Attempts have been made from time to time to extend this statute by straining its provisions to other offences not within any possible definition of "*vagrancy*," and many serious instances of injustice have occurred in cases where Magistrates have inconsiderately misapplied this law to offences not within its proper scope. Inasmuch as it invests them with a summary power over the liberty of the subject, its application should require from them the utmost caution not to

assume to themselves such a formidable jurisdiction unless the terms of the Act are clearly applicable to the offence and the proof of it conclusive. It is a criminal statute very highly penal, investing them with a somewhat unconstitutional power and, therefore, if the slightest doubt exists as to its construction, they should refrain from exercising that summary power of imprisonment. Happily for the liberty of the subject, the Superior Courts when appealed to have very properly construed this despotic Act according to its obvious intent and peremptorily rejected attempts by ignorant or injudicious Magistrates to extend it beyond its manifest scope. In a memorable case (*Johnson* v. *Fermer*, 33 J. P. 740), the Court of Queen's Bench sternly and at once refused to construe the "fortune-telling clause" as extending to conjuring or sleight of hand, holding that the general words "or other device" are to be read as *ejusdem generis* with palmistry and the acts expressly prohibited, which are obviously the various forms of fortune-telling. Magistrates, therefore, should be very cautious in exercising their jurisdiction under this last relic of the penal legislation of our ancestors and certainly the most arbitrary and unconstitutional law yet lingering in the statute book, but which by some strange oversight has escaped the notice of the criminal law reformers. It is arbitrary inasmuch as it invests the Magistrates with an absolute power of imprisonment without even the option of a fine; and it is unconstitutional, inasmuch as it places the liberty of the subject at the mercy of one man, without the protection of trial by jury and with no other remedy for a wrongful judgment than a costly and perhaps ruinous appeal to the Quarter Sessions.

Origin of the Vagrant Act.

The Vagrant Act is, indeed, in origin, in principle, and in design a supplement to the Poor Law, as it was in old times, when the Legislature exhausted ingenuity in endeavours to keep the labouring classes within the boundaries of their own parishes. The Vagrant Act was really inspired by the now happily abandoned Law of Settlement. From beginning to end it was devised by the framers to keep *out of* the parishes intruders who might become a burden upon the rates, and to keep *in* their parishes those who might bring charges upon them by running away. It was an Act specially to put down beggars, who asked for alms directly, and gipsy fortune-tellers who were only beggars with a pretence and whom it summarily punished with three months imprisonment—a greater punishment than in these more humane days we award to a thief for his first offence. Running away and leaving a wife or children chargeable to the parish are offences punishable in the like vindictive manner.

How to construe the Vagrant Act.

Such being the character of this statute, so liable to be abused and, it must be confessed, so often abused, it behoves the Magistrate to exercise the utmost caution in its administration. He should construe it as all penal statutes are to be construed —strictly *against* the statute and *in favour* of the defendant. Every word is to be read in its most restricted sense and no meaning is to be strained for any purpose whatever. The Magistrate must be satisfied that the defendant is, in the full sense of the term, what the law for the purpose of defining its scope and intent has called him, "*a rogue and a vagabond.*" To hold, for instance, a gentleman having a fixed abode in a private house and not going wandering about, to be "a rogue and a vagabond,"

would be a manifest abuse of the statute and of Magisterial power. Being a highly penal statute, the Magistrate should enforce its provisions with gentleness and, where he has no option but imprisonment, he should remember that it is a relic of a past barbarism and not enforce its unconstitutional penalty until all other means to deter the offender have been tried and failed. A first conviction for the strange offence of being "a rogue and a vagabond" should invariably be dealt with by discharge, with a warning that if the offence should be repeated punishment will follow; and imprisonment should *never* be inflicted until that warning has failed of its effect. The object of this, as of so many other laws for the repression of misbehaviours that are not crimes, is *prevention*. Punishment should be resorted to only when it becomes necessary to enforce prevention.

Disorderly houses.

In the same class of offences is the suppression of *Disorderly Houses* and places where loose and disorderly persons congregate. In such cases the Magistrate, where he has jurisdiction, should be careful to ascertain the exact extent and true character of the alleged nuisance and especially if the defendant has been warned that complaint would be made if he continued to give cause for it. In dealing with Houses of Ill Fame, the Quarter Sessions should in like manner inquire particularly as to the actual conduct of the house and whether it had been the cause of riot and disturbance within or without.

The object of these prosecutions is usually the removal of the nuisance, and if this object has been accomplished by the defendant having already quitted the house he should be bound in his own recognisances to come up for judgment when called upon. Or if he declares his willingness to give it up, judg-

ment should be deferred to the next Sessions to enable him to do so. If he fails to perform his promise, or if having been thus considerately treated he offends again, substantial punishment should follow —a fine bearing some proportion to his discreditable gains—or imprisonment, if the case has exceptionally bad features—but then only.

CHAPTER XXII.

PAYMENT OF PENALTIES AND COSTS—REWARDS—BAIL.

Payment of penalties.

How to enforce the *payment of a penalty* is often a question not to be answered too hastily. The doubt arises from the difficulty of ascertaining if the alleged present inability to pay is real or pretended. It is found in practice that if the penalty and costs are of no large amount and the Magistrate insists on immediate payment or the alternative imprisonment, the money will be forthcoming, notwithstanding the solemn assertions of the defendant that he had not a shilling in his pocket. If time for payment be allowed, the process of enforcement in case of default thereafter is troublesome. Where, however, the Magistrate is satisfied that the defendant is really unable to pay and he is a resident in the Division, or in regular work, a reasonable time should be allowed to him to pay a part or the whole of the penalty. This practice might, I think, with advantage be extended to permission to pay by instalments. If, however, the defendant lives out of the jurisdiction, or is not a householder, nor has any visible effects, nor is in regular employ by some known neighbouring master, this indulgence should not be extended to him unless it is for an offence for which imprisonment is not a proper punishment. Where

from the nature of the offence imprisonment is deemed the fittest penalty but the law gives option of a fine, immediate payment should be required.

Reduction of penalty.

The law has limited the extreme amount of penalty in all cases. But it permits a very extensive latitude for reduction of penalties. With the exception of revenue prosecutions, I can recal but two or three in which the statute has prescribed a minimum of reduction. In this wide range a large choice is open to the Magistrate.

Unequal penalties.

Leniency should be the rule, severity the exception. In determining the amount of penalty to be imposed, the Magistrate should take into account not alone the character of the offence but the condition of the offender. Fines the same in nominal amount may be very unequal in the degree of punishment inflicted by them. A penalty of 5*s.* to a man who earns 15*s.* per week is a heavier penalty than 5*l.* to a man well to do. In many cases, as in assault and cognate offences, the limit is set far too low for the ends of justice. To fine a man having an income of a thousand a year 5*l.* for some wanton breach of the law (as is often seen in the Metropolitan Police Courts), is merely a mockery of justice. This branch of the law requires an amendment which should enable the Magistrate to inflict a higher penalty somewhat in proportion to capacity to pay and also to award a limited compensation to the injured party in all cases. As it is, the Magistrate must look at both ends of the scale and measure the punishment by its actual and not by its nominal amount. To be deprived of half or even a fourth of a whole week's wages is a very severe punishment for a working man and it is to be remembered that his unfortunate family are more the sufferers by it than himself.

Costs.

Costs should, as a rule, follow the event. It is a wholesome rule that prevents much speculative litigation and deters neighbours from bringing all their petty quarrels to a police court. But there are cases where the successful party has been so much in the wrong that justice requires that he should bear his own costs. In the instance of cross-summonses referred to in a former page, each party may be properly left to payment of his own costs.

Costs to be considered with the penalty.

But where costs are ordered to be paid the Magistrate should always ascertain their amount before he determines the penalty, inasmuch as they substantially form a part of the punishment. Much surprise is sometimes expressed by persons who merely read the reports of proceedings in Magistrates' Courts, that the costs often exceed the penalty and this they deem to be a great wrong and perhaps write gushing letters to the newspapers denouncing the doings of the "great unpaid," and sighing for a Stipendiary. It should be known that, whether the Magistrate be paid or unpaid, in this particular at least the result would be the same. Both calculate the penalty and costs together and if the costs are considerable they reduce the *penalty* proportionably, so that the total represents the punishment to which the offender is deemed to be properly subjected. When an outcry is raised about the amount of costs it should be known to all that the costs of the Court are very trifling. Always the principal item in *costs* is the expense the complainant has incurred in attendance with his witnesses, who must be paid for their time and travelling. It would be indeed unjust if the wrong-doer could throw upon the party seeking redress for his wrong the further wrong of paying to be righted.

Rewards.

At the Assizes and Quarter Sessions the Court is empowered to order a *Reward* to persons who have been active in the prosecution of a felony. This power should be exercised with some discrimination. The service to be so rewarded should be an extra-ordinary service—such as remarkable courage in capture of the felon, rare ingenuity in discovering the offender or cleverly tracing the stolen property. The mere discharge of *duty* is not a sufficient claim, especially on the part of Policemen or Detectives. It is the business of a constable to display somewhat more courage than an ordinary citizen. It is the business of a Detective to devise ingenious schemes for the discovery of crime and criminals and to exercise more than common skill in the execution of those schemes. A special reward may be well bestowed on an occason which will commend itself to the public; but rewards lose their value if given for services that *not* to have rendered would in fact have been a failure of duty.

A more liberal use of this useful power may be exercised in the case of private persons who have displayed courage or skill in the detection of a crime, or capture of a criminal, or otherwise incurred extra-ordinary trouble in promoting the prosecution or procuring a conviction.

Admitting to bail.

The privilege of admitting to *Bail* is not so largely used as it might be with safety—and if with safety with advantage. It is a remarkable fact that very few persons committed for trial and admitted to bail neglect to appear or make off and leave their bail to pay the forfeiture. I am not aware what are the precise statistics, or if any figures have been found to show what proportion of all the bailments in England are forfeited. But at Middlesex Sessions, where one-

eighth of all the criminals in the United Kingdom are tried and the proportion of bail cases is greater than elsewhere, I cannot recall more than five forfeitures of bail for non-surrender at the trial in the course of twelve years — or somewhere about one in four thousand committals. This fact is most encouraging to those who hold, with myself, that imprisonment before trial may be greatly diminished, with advantage to the country in the saving of expense and of justice to the accused who now suffers a double punishment. Discretion is necessary in the exercise of this power of admitting to bail. Something must depend upon the nature of the crime charged and the penalties that attach to it—for a man may escape from hazarding penal servitude who would not even try to avoid the risk of imprisonment. Something is to be considered also in relation to the social *status* of the prisoner. A man of good position would be more likely to run away from a degrading punishment than a man to whom a prison brings no such terror — as some memorable instances have recently shown. But, where no such objections appear, Magistrates may with advantage extend the privilege of Bail by lessening the amount of bail required, or, which would be more beneficial to the prisoner, accepting one surety instead of two. It must be remembered that, in addition to the forfeiture of bail, Justice has the further security that at any time a warrant can be issued for the apprehension of the offender—so that he practically suffers banishment or if he returns will be tried as if he had never escaped.

CHAPTER XXIII.

GENERAL REMARKS ON THE ADMINISTRATION OF CRIMINAL JUSTICE.

The administration of the law is more important to a community than the law itself, for the best laws unfairly or harshly enforced are of less efficacy and less satisfactory to the subject than the worst laws judiciously and kindly administered.

Importance of the criminal law.

And the importance of a good administration of the Criminal Law is greater than any other, inasmuch as life and liberty are more precious and more jealously to be regarded than property. The sense of insecurity from abuses of the criminal law disturbs more or less every individual in the land. Defective property laws affect only a few.

Confidence in its administration.

The best security for social order is found in the confidence felt by the lowest classes and the persons most frequently subjected to it that they will receive throughout a trial not justice merely but a full and fair hearing. The worst criminal knows that he will find in the tribunal that tries him an inclination to judge him favourably rather than otherwise, and he has the most perfect assurance that he will not be convicted save upon the clearest proof, the burden of which is upon the prosecution, bound to prove him to be guilty by sufficient evidence. He feels that in the Judge he will have a friend, in the

Jury patient listeners to all that can be said for him, with the confidence that if there be reasonable doubt they will give him the benefit of it, that the penalties he has incurred will be awarded fairly but firmly and with so much of mercy to the criminal as may be consistent with justice to the public.

Sources of the popularity of our criminal courts.

It is this confidence of all classes in the administration of the Criminal Law in Great Britain that gives to its tribunals a popularity enjoyed in no other country. Doubtless it has often occurred to the reader as a remarkable fact, that the tribunal which might be supposed, from the nature of its duties, to be most hated is really the most popular. Whatever complaints are raised against other institutions few are directed against this one. The classes most subject to it are the last to find fault with it—not because they like the law that punishes their offences but because they are satisfied with the manner in which they are treated by those who administer the law. They know that when they are brought into the dock they will have fair play. Nothing will be pressed against them harshly nor unduly. Whatever is doubtful will be construed in the sense most favourable to them. They will be assumed to be innocent until proved to be guilty. The accused or his Counsel will be permitted to say freely all that can be said on his behalf. Himself and his witnesses will be heard patiently. All the sworn twelve must agree to find him guilty or he must be acquitted. In the Judge is recognized a protector who will see that every point in his favour is elicited, and that if convicted his punishment will be really more lenient than his crime and his career deserve. It is some consolation to the convict and his friends and a satisfaction to the public that, whatever the result, he has had a fair trial, which cannot always be said of

the criminal tribunals upon the Continent of Europe and is only found in America, where the people have preserved, with even more than our own regard for them, the principles and practice in the administration of the criminal law they inherited from our common ancestors.

Theoretically imperfect.

We may admit that the system is not altogether logical, nor philosophical, nor theoretically good—that it opens too many doors for guilt to escape—that it treats a trial as too much an individual and not sufficiently as a public question,—that the object of the criminal law should be the conviction of the guilty, and that the best law is that which affords the fewest chances of escape to the actual criminal, as, indeed foreign jurists do say of it. Nevertheless it appears to me that our practice is to be preferred.

Reasons for preferring the imperfections.

If some are thus enabled to evade the penalty of their crimes, it gives to *all* a sense of security, in the knowledge of the immense protection thus secured to the innocent, the value of which is incalculable. In some countries to be accused is to be condemned, and who can be sure that he has not enemies who may become accusers,—or what combinations of suspicious circumstances, especially in the case of some act or opinion exciting public prejudice, may not at some time of his life subject him to charges in which appearances are against him or prejudice may point at him? Against such a contingency, which may occur to the best of us and often does occur to good men in countries where the criminal law is less regardful of liberty, the safeguard lies in the constitution and practice of our criminal tribunals. The conviction of five, or even ten, per cent. of our actual criminals would be dearly purchased at the price of that sense of positive security which *every man* now enjoys, by reason of the rules

jealously constructed for the protection of innocence, through the operation of which it is that the guilty are enabled sometimes to escape.

Gentleness should characterise its administration.

Such being the character of criminal justice in this country, the same characteristics should attend its entire administration.

Let gentleness *its* strong enforcement be.

The slightest appearance of asperity should be avoided. The utmost latitude for self-defence should be permitted to the accused. If undefended, he should not merely be permitted, he should be invited and encouraged, to cross-examine the witnesses against him. The Judge should ever assist him in this. With this object the Judge might advantageously consult the depositions to see what answer to the charge, if any, was there made by the prisoner. He should turn also to the evidence of the various witnesses, if there was then a cross-examination, to learn what facts it elicited or to what the questions pointed. Thus informed, the Judge may properly further examine the witnesses for the prosecution upon the points so suggested and upon any questions that may occur to himself calculated to elicit the whole truth, which does not always appear upon the examination-in-chief. A kindly tone in speaking to the prisoner, at least until the verdict affirms his guilt, is never out of place, and even in passing sentence the expression should be more of sorrow than of anger,—save in cases marked by cruelty and brutality, or when expression ought to be given to the natural feelings of indignation which the Judge will share with the whole Court.

Irrelevant questions.

The Judge should interpose a peremptory veto on the practice of cross-examination directed professedly to discredit a witness, but really designed only for

annoyance, as by reference to some long past scandal which in nowise affects his trustworthiness in the present trial. So also should he protest against that bullying of an honest witness which, to the credit of our Criminal Courts be it said, was formerly more frequent than now and which, let us hope, is fast approaching extinction. A stranger to our courts might sometimes be led to suppose the injured prosecutor to be the criminal and the criminal the injured party, such is the tone of cross-examination to which he is subjected and such the imputations made or insinuated against his honesty and veracity. The witness is discharging a public duty and is entitled to the protection of the Court in the performance of it.

Witnesses entitled to protection of the court.

Patience next to impartiality is the virtue most required in a Judge; for often it is sorely tried. Speeches of inordinate length, "full of sound and fury, signifying nothing"—tedious and wholly irrelevant cross-examinations, witnesses of dense stupidity, Juries disagreeing upon a clear case, are trying to the finest temper. But they should be borne with all possible equanimity, or, at least, expressions of impatience should be repressed.

Patience.

Summing up should be what the name implies—a brief summary of the whole case, directing the jury at the beginning to the questions actually in dispute, or which they will have to determine, and narrating no more of the undisputed facts than is necessary to enable them to form a fair judgment of the points really at issue. These questions should be stated succinctly but with clearness and in language so plain that all understandings shall readily grasp them. The facts, as they bear upon such question, should be stated separately on treating of each, even at the risk of

Summing up.

repetition. The questions themselves should be repeated at the close of the summing up, so that they may be full in the memories of the Jury when they come to consider the verdict. In narrating the facts of this case it is generally desirable to take them in the order of time. It is rarely requisite to refer to the evidence of each witness separately. The entire of the case should be marshalled and re-arranged so as to present at one view all that relates to each question separately. Only so much of the evidence as is material to the points to be decided should be repeated to the Jury in summing up.

One of the most important and one of the most difficult of the duties of the Judge and Magistrate is to close his mind upon the Bench against prejudices and prepossessions prevailing out of doors. Ever he must guard himself against temptation that will continually beset him to win popularity or avoid unpopularity by running with the tide of the hour. Never should he suffer a thought to stray from the passionless work of his Court to the praise or the censure of those whose business it is to make "topics," supply to readers something to talk about and create or swell a "sensation." Nor is this his whole duty. He should do more than shun temptation. He should set a public example of resistance to popular clamour. With what good effect a brave Judge can do this was seen in the instance of Lord Hale, whose moral courage in the face of popular prejudice stayed by his single dictum the barbarous persecution, and with the persecution the plague, of witchcraft. There are few of us who have not witnessed tempests of popular prejudice, during which any straining of the law, any violation of the principles of justice, any perversion of proof, conviction without evidence or even against

it has been applauded and almost demanded and when the objects of the passing passion have had no other protection against cruel wrong than the moral courage of the Judge or the Magistrate, resolutely deaf to any other voices than those of law and justice. Such scenes have been often before. They will be often again. Even now we may be entering upon a series of them, for ugly symptoms are rife. It is a very real danger. The hope of escape from it rests in the resolute resistance by all who administer the Criminal Law to the first whispers of the storm.

Hints to Magistrates.

Precisely the same principles in the administration of justice should govern the Magistrate in the performance of his scarcely less important duties. His bearing and tone should be of kindness and gentleness. These will be far more effective than any severity, whether of aspect or of voice. The Magistrate, be it remembered, is not wholly a Judge. His office practically partakes of that of an arbitrator, and it is never more beneficently employed than when he plays the part of friend and adviser also. A few good words spoken by him in good time will often suffice to restore harmony to a quarrelsome neighbourhood, to nip litigation in the bud and send away as friends those who came to him as foes. It is in this spirit that justice should be administered by the Magistrate, who should in fit cases endeavour to bring about an amicable settlement before he exercises his judicial authority. No other man has such opportunities for good where his neighbours have confidence alike in his justice and in his kindness.

There is a further spirit in which the Criminal Law should be administered everywhere—at the Assizes, at the Quarter Sessions and in Magistrates' Courts; and in this term "criminal law" I

comprise all cases of *misbehaviour* as well as of *crime* to which the law affixes a *punishment*, and to which belong the extensive class known as *Summary Convictions*.

Criminal Courts more than any others deal with the vices, faults, and follies of Man, with his weaknesses as well as his wickedness. These should be considered not so much from the rigid point of view of the Divine or the Moralist as from the standpoint of our common sense—with a large and generous allowance for human faults and failings. Ever it should be borne in mind by the Judge and the Magistrate that there is a great deal of human nature in all of us. Trifling errors should be forgiven, small lapses from the strict path of virtue should be excused. There is great virtue sometimes in shutting the eyes. There is much in the world which it is the part of a wise man *not to see*, for the Judge and Jury should alike feel profoundly that the law is to be administered in its spirit, which gives life, rather than according to its strict letter, which kills. The large and liberal view of every question should be recommended. It is not is he *technically* guilty. It should be, is he *substantially* guilty? We should ask ourselves, can any reasonable excuse be suggested? Was a crime intended? Was it an act of wickedness or only of weakness? Let us look at it as Men—with the eye of common sense—with all due allowance for the frailties of humanity. Thus viewed the question will be if on the whole the accused is guilty and what measure of punishment the offence thus charitably considered may be deemed to deserve.

We should deal with Man conscious that ourselves are Men,—in a large *manly* spirit — avoiding all womanish weakness and sentimentalism in the treatment of crime and criminals. Almost all the cruelty

and injustice ever perpetrated under cover of Criminal Law has been the product of prejudices growing out of *sentiment*. Where that prevails there is neither justice nor mercy. Common sense, sober reason, calm judgment, are stifled. "Heaven deliver us from a sentimental Judge" was the exclamation to me of a great Advocate who uttered the experience of a long career. In the Magistrate sentimentalism is equally a fault and, if there be an inclination to indulge in it, double care should be taken to guard against its influence.

Popular prejudice.

Knowledge of the ways of the world, knowledge of man, knowledge of human nature, strong common sense, a manly mind, capacity to take a large view of things freed from prepossessions and prejudices—these are the essential qualities of a good Judge and a good Magistrate.

Criminals not wholly bad.

And it would be well for all of us if we were reminded sometimes that we should not conclude too hastily that they who are criminal or vicious in one or even in many ways are criminal and vicious altogether. The proverb says, "Show me a liar and I will show you a thief." It is only partially a truth. Liars are not always larcenous, nor are thieves always liars. Rogues recognise a code of honour among themselves and are as faithful to it as ever was belted knight to his. There is some good in every man, if only we rightly search for it. (*a*) The vilest

(*a*) But the honour of a thief is not always confined to his fellows. A striking instance of this once occurred to myself. A man had been tried, convicted, and sentenced to six months imprisonment for larceny. As he was leaving the dock, a person spoke to him from the floor of the court, and he broke into a flood of tears. Seeing this, I called him back and enquired what it was that had so grieved him. "Oh, my Lord!" he said, "I am told that my poor wife died in child-

criminal was an innocent child once—

> None are *all* evil; lingering round the heart,
> There are some virtues that will not depart.

I remember, long years ago, before it had become my business to learn so much about crime and criminals, to have read Mr MAYHEW's admirable sketches of Prison Life. I was much interested in a curious story he tells of a little blue flower, which according to the legend of the Penitentiary, is only found growing on the graves of the convicts. When viewing these men in the dock waiting their sentence, this little blue flower dropped from heaven upon that darkest of all spots upon earth—the grave of the convict,—has often come into my mind and I have thought if there may not be lingering still somewhere in those hardened hearts a seed we cannot see but which, the dew of heaven descending upon it, might

bed last night from sorrow for me, and I was not there to close her eyes." At once I resolved to trust him. "If you will give me your word that you will come here on the first day of next sessions to receive your punishment, you shall go and bury your wife." Those about me were sure I should never see him again. "I put you upon your honour," I repeated; "I trust you." The promise was given. With expression of extreme gratitude he left the court. At the next Sessions great curiosity was felt as to the result of so uncommon, and as some thought unjustifiable, an experiment. But when the court met the convict appeared as he had promised, in mourning, saying, "I am come, as I promised, to take my sentence." After a moment's reflection I said, "You have behaved well— and so well that I shall not inflict upon you the sentence I had intended. In the hope that you will repent the past and be honest for the future, I will give you a chance to retrieve the character you have lost. You shall go on your own recognizances to come up for judgment when called on." I have been informed that he has profited by the lesson and has since preserved an excellent character for honesty and industry.

yet with God's blessing grow into a flower of grace if only we knew how to cultivate it.

Such a reflection, however, cannot change the course of the law nor affect the duty of the Judge. But it may incline him to temper justice with mercy and pray that the dew of heaven, which does not despise the convict's resting place, may find an entrance into his heart before that little blue flower shall smile upon his lonely grave.

INDEX.